SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 555.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

PAUL BEATTY, ALMA JACKSON AND ROBERT H. JACKSON, HER HUSBAND, AND LUCY E. BARBEE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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1a UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit begun and held at the courthouse, in the city of Richmond, on the first Tuesday in February, being the fourth day of the same month, in the year of our Lord one thousand nine hundred and thirteen.

Present: Hon. J. C. Pritchard, circuit judge; Hon. Alston G. Dayton, district judge; Hon. Henry A. M. Smith, district judge.

Among other were the following proceedings, to wit:

Paul Beatty, Alma Jackson, et al., Lucy E. Barbee, plaintiffs in error,
vs.
United States of America, defendant in error.

In error to the District Court of the United States for the Western District of Virginia, at Lynchburg.

Be it remembered that heretofore, to wit, on November 18, 1912, the petition for a writ of error, order allowing writ of error, writ of error supersedeas bond and citation, were filed in our said Circuit Court of Appeals here, which are as follows, to wit:

2a *Petition for writ of error.*

In the United States District Court for the Western District of Virginia.

Petition for writ of error in cases #2074 to #2077 and #2079 and #2080.

UNITED STATES GOVERNMENT
vs.
PAUL BEATY ET AL. } At Law, #2074.

And cases 2075 to 2077, inc., and 2079 and 2080.

The defendants in the above-entitled causes, feeling themselves aggrieved by an order of the court entered on the 9th day of August, 1912, comes now, by their attorneys, O'Flaherty, Fulton & Waller and E. H. Jackson, and pray for an order allowing them to prosecute a writ of error before the United States Circuit Court of Appeals for the Fourth Circuit under and according to the laws of the United States in that behalf made and provided, because of certain errors committed to the prejudice of these defendants, all of which will more fully and detail appear from the assignment of errors, which is filed with this petition, that a transcript of the record, proceedings, evidence, and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit; that the amount of bond and security which the defendants are

required to give and furnish upon said writ of error may be fixed, and that upon the issuing of said writ of error all further proceedings upon said judgment or order and in this cause be suspended and stayed until the determination of the writ of error by the said United States Circuit Court of Appeals for the Fourth Circuit.

And your petitioners will ever pray, &c.

Paul Beaty, S. E. Macatee, Roberta Macatee Earl, John B. Earle, Sara R. Macatee, Margie Macatee, Carrie P. Kuser, Lucy E. Barbee, James W. Bundy, William Brown, Alma Jackson, and R. H. Jackson,

By O'FLAHERTY, FULTON & WALLER and E. H. JACKSON,

Counsel.

Aug. 9, 1912.

3a *Order allowing writ of error.*

In the United States District Court for the Western District of Virginia, continued and held at Lynchburg on August 9, 1912.

Order granting writ of error in cases 2074 to 2077, both inclusive, and in cases 2079 and 2080.

Upon reading the petition of the defendants, it appearing that assignments of error have been filed, it is ordered that writ of error issue as prayed and that a transcript of the record of these proceedings, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fourth Circuit, provided that bond in penalty of $5,000, with good security, to be approved by the judge of this court, and conditioned as a supersedeas bond, to wit, to pay all damages and costs, be executed, approved, and filed within fifteen days of this date.

It is further ordered that the blueprint map—"Govt. Ex. No. 1"—be certified and transmitted by the clerk of this court to the Circuit Court of Appeals.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District Court of the United States for the Western District of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between 2075, The U. S. *vs.* Wm. Brown & Jas. Wm. Bundy; No. 2076, U. S. *vs.* Alma Jackson and Robt. H. Jackson; No. 2077, U. S. *vs.* S. E. Macatee, Robt. Macatee Earle, Jno. B. Earle, her husband, Margie J. Macatee & Sarah R. Macatee; No. 2079, U. S. *vs.* Carrie P. Kuser; No. 2080, U. S. *vs.* Lucy E. Barbee;

4a No. 2074, U. S. *vs.* Paul Beatty, a manifest error hath happened, to the great damage of the said defendants, as by their

complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 9th day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, this 9th day of August, in the year of our Lord one thousand nine hundred and 12.

STANLEY W. MARTIN,
Clerk of the District Court of the United States for the Western District of Virginia.

Allowed by—
Hon. HENRY C. McDOWELL,
U. S. District Judge.

Supersedeas bond.

In the United States District Court for the Western District of Virginia.

Know all men by these presents that we, Alma Jackson, Lucy E. Barbee, & Paul Beaty, and the Fidelity & Deposit Company of Marlyand, Baltimore, Md., as surety, are held and firmly bound unto The United States of America in the full and just sum of
5a $5,000.00, to which payment well and truly be made, the said Alma Jackson, Lucy E. Barbee, & Paul Beaty bind themselves, their heirs, executors, and administrators, and the said Fidelity & Deposit Company of Maryland, of Baltimore, Maryland, binds itself, its successors, and assigns firmly by these presents.

Signed and sealed this 20th day of Aug., A. D. 1912, the said Alma Jackson, Lucy E. Barbee, & Paul Beaty hereto affixing their hands and seals, and the said Fidelity & Deposit Company of Maryland, of Baltimore, State of Maryland, acting by W. J. Kendrick, who has signed hereto the name of the said company as attorney in fact and affixed hereto the corporate seal of said company.

Whereas lately at a District Court of the United States for the Western District of Virginia, in a suit depending in said court between The United States of America and Alma Jackson, Lucy Barbee, & Paul Beaty and others, a judgment was rendered against the said Alma Jackson, Lucy E. Barbee, Paul Beaty, and others, and the said Alma Jackson, Lucy E. Barbee, & Paul Beaty having obtained an appeal to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such that if the said Alma Jackson, Lucy E. Barbee, Paul Beaty, and others shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, and pay and abide the further order of this court in said cause, or of the United States Circuit Court of Appeals for the Fourth Circuit, to be entered in the appeal proceedings, then the above obligation to be void; otherwise to remain in full force and virtue.

PAUL BEATY, [SEAL.]
ALMA JACKSON, [SEAL.]
LUCY E. BARBEE, [SEAL.]
FIDELITY & DEPOSIT CO. OF MD.,
Surety,
By W. J. KENDRICK, *by Atty. in Fact.*

Subscribed and acknowledged before me this August 20th, 1912, by Alma Jackson, Lucy E. Barbee, Paul Beaty, and W. Kendrick, the attorney in fact for the Fidelity and Deposit Company of Maryland, Baltimore, Maryland.

MARVIN A. TROUT,
Clerk, Circuit Court, Warren County,
State of Virginia.

6a *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to United States of America, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 19th day of September, 1912, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Virginia at Lynchburg, wherein Paul Beaty, S. E. Macatee, Roberta Macatee Earle, Jno. E. Earle, Margie J. Macatee, Sarah R. Macatee, Wm. Brown, Jas. W. Bundy, Carrie P. Kuser, Lucy E. Barbee, Alma Jackson, Robt. H. Jackson are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry C. McDowell, judge of the District Court of the United States, this 9th day of August, in the year of our Lord one thousand nine hundred and twelve.

HENRY C. McDOWELL,
District Judge.

Service accepted this Aug. 9, 1912.

BARNES GILLESPIE,
United States Attorney.

On the same day, to wit, November 18, 1912, the appearance of D. C. O'Flaherty, M. J. Fulton, and A. Hilton Jackson is entered for the plaintiffs in error.

Motion of William Brown and others to dismiss writ of error as to them.

(Filed November 19, 1912.)

United States Circuit Court of Appeals, Fourth Circuit. No. 1143.

PAUL BEATTY, ALMA JACKSON ET AL., LUCY E. BARBEE, William Brown et al., S. E. Macatee et al., Carrie P. Kuser, plaintiffs in error,
vs.
UNITED STATES OF AMERICA, DEFENDANTS IN ERROR.

7a Now comes S. E. Macatee, Roberta Macatee Earle, John B. Earle, her husband, Margie J. Macatee, and Sara R. Macatee, and William Brown, Jas. William Bundy, and Carrie P. Kuser, parties plaintiff in error in the above cases, and moves the court to dismiss the writ of error heretofore granted by the District Court of the United States for the Western District of Virginia on August 9th, 1912, as to them, at their costs.

O'FLAHERTY & FULTON,
Counsel for Plaintiffs in Error.

Consent of defendant in error to dismissal of writ of error as to William Brown and others.

(Filed November 19, 1912.)

In the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, held on October 4, 1912.

WILLIAM BROWN ET AL. *v.* UNITED STATES. } Original. No. 2075.

S. E. MACATEE ET AL. *v.* UNITED STATES. } Original. No. 2077.

LUCRETIA THOMPSON ET AL. *v.* UNITED STATES. } Original. No. 2078.

CARRIE P. KUSER ET AL. *v.* UNITED STATES. } Original. No. 2079.

ELLA S. KENNY ET AL. v. UNITED STATES. } Original. No. 2081.

NEWTON GARRETT ET AL. v. UNITED STATES. } Original. No. 2082.

MARTHA POMEROY ET AL. v. UNITED STATES. } Original. No. 2083.

The defendant in error in the above causes hereby consents that these causes be now dismissed at cost of plaintiffs in error and remanded to the United States District Court for the Western District of Virginia, at Lynchburg.

BARNES GILLESPIE,
United States Attorney.

8a *Order dismissing writ of error as to William Brown and others.*

(Filed and entered November 19, 1912.)

United States Circuit Court of Appeals, Fourth Circuit. No. 1143.

PAUL BEATTY, ALMA JACKSON ET AL., LUCY E. BARBEE, William Brown et al., S. E. Macatee et al., and Carrie P. Kuser, plaintiffs in error,
vs.
UNITED STATES OF AMERICA, DEFENDANTS IN ERROR.

In error to the District Court of the United States for the Western District of Virginia.

This cause having been called on the motion of S. E. Macatee, Roberta Macatee Earle, John B. Earle, her husband, Margie J. Macatee, Sarah R. Macatee, William Brown, Jas. William Bundy, and Carrie P. Kuser, by their counsel, to dismiss the writ of error in this cause as to them.

Therefore in pursuance of said motion and by the consent of the United States attorney in writing,

It is now here ordered and adjudged by this court that the writ of error in this cause as to them be, and the same is hereby, dismissed at their costs.

J. C. PRITCHARD,
U. S. Circuit Judge Presiding.

Nov. 19, 1912.

November 23, 1912, the appearance of Barnes Gillespie, United States attorney, is entered for the defendant in error.

Order extending time for filing of transcript of record.

(Filed December 6, 1912.)

9a At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, in and for said district on December 2nd, 1912.

Hon. HENRY C. McDOWELL,
Judge.

UNITED STATES
vs.
PAUL BEATY ET AL. AND OTHER CONDEMNATION CASES. } No.

The time for certifying transcript to Circuit Court of Appeals is hereby extended ten days from this date.

The clerk will certify a copy hereof to the clerk of the Circuit Court of Appeals at Richmond.

A copy.

Teste:

STANLEY W. MARTIN,
Clerk, United States District Court,
Western District of Virginia.

Afterwards, to wit, on December 12, 1912, the transcript of the record of the said district court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

7 *Transcript of record.*

(Filed Dec. 12, 1912.)

Caption.

UNITED STATES OF AMERICA,
Western District of Virginia, to wit:

Fourth Circuit.

At a District Court of the United States, for the Western District of Virginia, begun and held at the courthouse in the city of Lynchburg on the Tuesday after the first Monday in March, 1912, being the 5th day of the same month in the year of our Lord one thousand nine hundred and twelve.

Present: Hon. HENRY C. McDOWELL, District Judge for the Western District of Virginia.

Among others, were the following proceedings, to wit:

UNITED STATES
vs.
PAUL BEATTY ET ALS. } At law.

Petition.

(Filed October 31, 1911.)

In the District Court of the United States in and for the Western District of Virginia.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PAUL BEATTY, DEFENDANT.

Petitioner to condemn land.

To the Honorable District Court of the United States for the Western District of Virginia:

Your petitioner, the United States of America, by Barnes
8 Gillespie, the attorney of the United States for the Western District of Virginia, respectfully represents that by an act of Congress of the United States, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1912," approved March 3, 1911, petitioner, by its proper officials, was authorized to acquire land accessible to the horse-raising section of the State of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service and to expend therefor a sum not exceeding two hundred thousand dollars; that in pursuance of said act, by its proper officials, petitioner made an examination of such lands as it was authorized to acquire under said act, and determined to acquire a certain body of such land in Warren County, Virginia, near Front Royal, consisting of about five thousand acres, which five thousand acres is composed of a number of smaller tracts; that Paul Beatty is the owner, in fee simple of thirty and thirty-four one-hundredths acres of said land proposed to be acquired as aforesaid, the said thirty and thirty-four one-hundredths acres being one of the smaller tracts of which the said five thousand acres consists; that petitioner is authorized by the statute in such cases made and provided to condemn land for its uses and purposes, aforesaid; that the proper official of petitioner, who was authorized to procure the real estate for petitioner for the uses above set out, is of the opinion that it is necessary and advantageous to the Government to acquire the same for petitioner by condemnation; that said official of petitioner so authorized to procure said real estate, made application to

the Attorney General of petitioner to cause proceedings to be commenced for condemnation of said real estate; that previous to said application to said Attorney General petitioner made a bone fide effort to agree, but, because of inability to agree upon the price or terms, it cannot agree on terms of purchase with those entitled to the land, which is wanted to be taken and used for the assembling, grazing, and training of horses purchased for the remount service, as set out in said act that there is herewith filed in the clerk's
9 office of this court, marked "Exhibit 1," a plat of the survey and a description of the land which is sought to be condemned, but it does not include a profile showing any cuts, fills, trussels or bridges, as there will be no cuts, fills, trussels or bridges; that there is also filed in the clerk's office of this court, marked "Exhibit 2," a memorandum showing the names and residences of the owners of said land, and showing also the quantity of land which is sought to be condemned; that the said plat and memorandum, marked "Exhibit 1" and "Exhibit 2" are made a part of this petition; that the interest or estate intended to be taken in the said land, mentioned in said plat, is a title in fee simple; that the material facts upon which the application for the appointment of commissioners is based are hereinbefore stated; that the land sought to be condemned is wanted for the uses and purposes of petitioner, as aforesaid.

Wherefore, your petitioner prays for the appointment of commissioners, as provided for by law, to ascertain what will be a just compensation for the land proposed to be condemned for its uses, and award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other persons, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of said land by your petitioner, and converting it to its uses, as aforesaid.

BARNES GILLESPIE,

United States Attorney for the Western District of Virginia, who appears for the petitioner by direction of the Attorney General of the United States.

STATE OF VIRGINIA,

County of Tazewell, to wit:

This day Barnes Gillespie, United Attorney for the Western District of Virginia, whose name is signed to the foregoing peti-
10 tion, personally appeared before me, Nye Britts, a notary public in and for the county and State aforesaid, and made oath that he is United States Attorney for the Western District of Virginia, duly authorized in the premises, and that the matters and things stated in the foregoing petition are true, as he verily believes.

Given under my hand this 30th day of October, 1911.

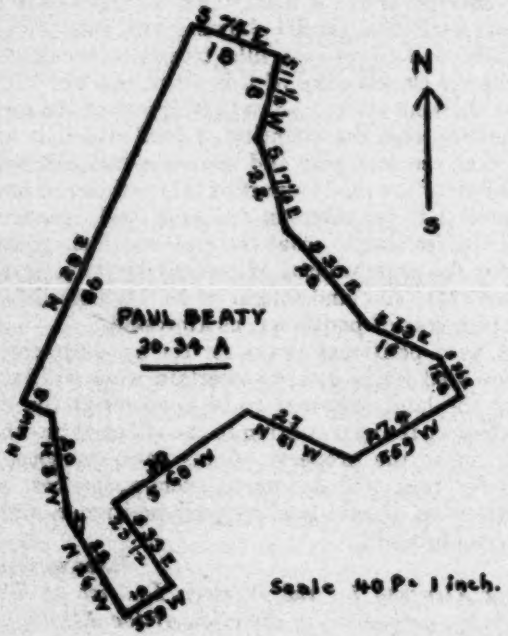
NYE BRITTS, *Notary Public.*

Exhibit 1.

(Filed October 31, 1911.)

Plat and description.

UNITED STATES
vs.
PAUL BEATTY.



PLAT OF THE SURVEY.

A tract of land situated in Front Royal magisterial district, in Warren County, Virginia, and bounded as follows:

Beginning at a stake at the end of a stone fence, a corner to Lauck, and Downing and Richardson; thence with Downing and Richardson seven (7) lines, viz.: South 74° east 18 poles to a stake in a ravine; thence south 11¼°, west 22 poles to a stake in an old road; thence S. 17¼° east 22 poles to a stake on the bank of the road; thence south 35° east 28 poles; thence south 63° east 16 poles; thence south 36° east 12.8 poles to a stone pile; thence south 59° west 27.4 poles to a stake in a hollow, a corner to Garrett; thence down the branch north 61° west 27 poles to a poplar on the branch corner to Garrett; then S. 60° west 38 poles to a stake on the south bank of

the road; thence in the road south 33° east 23½ poles to a stake, a corner to Carrie Kuser; thence south 59° west 10 poles to a stake on the bank of the Happy Creek, thence down the creek north 26° west 28 poles to a cluster of maples; thence north 8° west 20 poles to a large rock, elm, and ironwood; thence north 60° west 8 poles; thence across the county road north 28° east 86 poles to the beginning, containing thirty and thirty-four one hundredths (30.34) acres.

12 *Exhibit 2.*

(Filed October 31, 1911.)

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PAUL BEATTY, DEFENDANT.

A memorandum showing the name and residence of the owner of the fee simple of the thirty and thirty-four one hundredths (30.34) acres of land situated in Front Royal magisterial district, Warren County, Virginia, and described in the petition and exhibits filed in the above-styled case.

The owner of the fee simple of said tract of land is Paul Beatty. The residence of the said Paul Beatty is Arco, Warren County, Virginia.

13 *Demurrer filed January 6, 1912.*

In the District Court of the United States for the Western District of Virginia, at Lynchburg.

UNITED STATES GOVERNMENT,
vs.
PAUL BEATTY.

This day came the parties, defendant to the above entitled action, and demur to the petition filed in this cause, and for grounds of said demurrer say:

1st. That the said petition is not sufficient in law.

2nd. That there is no act of Congress or law of the United States authorizing the acquisition of the land and property mentioned in these proceedings by condemnation.

3rd. That the party or parties instituting said suit for and on behalf of the United States have no authority or warrant or law for so doing, and have not complied in commencing this proceeding with the laws in such cases made and provided.

4th. That this court hath no jurisdiction to entertain or maintain this suit, or lawful power to authorize the taking of the defendant's property by condemnation proceedings, and in the form, manner, and way that said land is sought in these proceedings to be taken from the demurrants.

5th. That said proceedings are wholly without warrant or authority of law.

For these and other grounds of demurrer to be assigned at the bar of the court, these demurrants pray the judgment of the court as to whether they shall be required to make any further or other answer to said petition and ask that the same be dismissed.

PAUL BEATTY, ET ALS.
By Counsel.

14 *Bill of exception No. 1.*

(Filed January 6th, 1912.)

In the United States District Court for the Western District of Virginia.

UNITED STATES *vs.* PAUL BEATTY.	No. 2074.
UNITED STATES *vs.* WM. BROWN, ET AL.	No. 2075.
UNITED STATES *vs.* ALMA JACKSON, ET AL.	No. 2076.
UNITED STATES *vs.* S. E. MACATEE, ET AL.	No. 2077.
UNITED STATES *vs.* LUCRETIA THOMPSON, ET AL.	No. 2078.
UNITED STATES *vs.* CARRIE P. KUSER.	No. 2079.
UNITED STATES *vs.* LUCY E. BARBEE.	No. 2080.

Be it remembered that on the hearing of the foregoing causes at Lynchburg, Va., on January 6, 1912, on the motion of the plaintiff to appoint commissioners, and after the court had appointed said commissioners, the defendants in each of said causes, by counsel, moved the court to add to the order appointing commissioners and

instruction to the commissioners as follows: "The commissioners on determining what is a just compensation for said land are instructed to take into consideration the full value of the property for the most advantageous uses to which it may be applied, and to take into consideration every other element of value, which would be taken into consideration in a sale of the land between private parties or by persons desirous of selling to persons desirous of buying the same, both freely exercising prudent and intelligent judgment as to its value and shall assess the full value thereof, and report the same to the court."

But the court overruled said motion on the ground that the
15 same was not in accordance with the practice in the courts of the State of Virginia; to which action of the court the said defendants, by counsel, then and there duly excepted and prayed that this, their first bill of exceptions, be signed, sealed, and made a part of the record, which is on this January 6th, 1912, accordingly done.

HENRY C. McDOWELL [L. S.],
District Judge.

16 *Order overruling demurrer, docketing case, and appointing commissioners.*

(Jan'y 6, 1911.)

In the United States District Court for the Western District of Virginia at Lynchburg.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PAUL BEATTY AND ALL OTHER PARTIES whom it may concern, defendants.	No. 2074.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* WILLIAM BROWN ET ALS., DEFENDANTS.	No. 2075.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* ALMA JACKSON ET ALS., DEFENDANTS.	No. 2076.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* S. E. MACATEE ET ALS., DEFENDANTS.	No. 2077.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* LUCRETIA THOMPSON ET ALS., DEFENDANTS.	No. 2078.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CARRIE P. KUSER ET ALS., DEFENDANTS. } No. 2079.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LUCY E. BARBEE ET ALS., DEFENDANTS. } No. 2080.

It appearing to the court that ten days' notice of the intention of the United States to apply to this court, by Barnes Gillespie, United States Attorney for the Western District of Virginia, for the appointment of commissioners to ascertain what would be a just com-
17 pensation for the land proposed to be condemned in each of the above-named proceedings, for the uses of the said United States, and to award damages, if any, resulting to the adjacent or other property of the owners, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said lands by the United States, and converting it to its uses, as set forth in the petitions filed in the above-named causes, has been given to each of the above-named defendants in each of the above-named causes in person, as required by law, and to all other parties whom it may concern by publication of said notice in each of said above-named causes once a week for two successive weeks in the Reporter, a newspaper published in the county of Warren, State of Virginia, wherein the land which is proposed to be condemned is located, and by posting copies of the same at the front door of the courthouse of the said county of Warren and at the front door of the courthouse of the said United States for the Western District of Virginia, at Lynchburg, ten days previous to this application; that the said United States, by Barnes Gillespie, United States attorney, as aforesaid, filed in the clerk's office of this court at Lynchburg, at plat, memorandum, and petition, in compliance with the provisions of law for such cases made and provided, in each of the above-named causes, the same having been filed in the first five named of said causes on the 31st day of October, 1911, and in the sixth named of said causes—that is, United States *vs.* Carrie P. Kuser—on the 8th day of November, 1911, and in the last named of said causes—that is, United States *vs.* Lucy E. Barbee—on the 29th day of November, 1911; and that the land sought to be condemned in each of said proceedings is wanted for the uses and purposes of the said United States; that said land in each of the said causes lies within the county of Warren, State of Virginia, and in
the western district of Virginia; the parties, both plaintiffs
18 and defendants, in each of said causes appearing by their attorneys; and it being agreed by the parties in each of the above-named causes, the same are brought on to be heard together, and the defendants in each of said causes, by counsel, demurred to the petition in each of said causes, and being required by the court

o to do, filed their written grounds of demurrer, which demurrer was overruled by the court, and to which ruling of the court the defendants in each of said causes excepted; and the court doth adjudge, order, and decree that these causes be docketed, and by agreement of the parties doth appoint G. O. Leach, J. W. Donaldson, W. E. Lake, Taylor F. Yates, and F. W. LeHew, five disinterested freeholders residing in said county of Warren, State of Virginia, and in the said western district of Virginia, any three or more of whom may act, for the purpose of ascertaining and reporting a just compensation for the land, in each of said causes, and awarding the damages, if any, resulting to the adjacent or other property of the owners, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of said lands by the United States, and converting it to its uses, as set out in the petitions in these causes; and the court doth designate the 25th day of March, 1912, at 11.00 o'clock a. m., for the said commissioners to meet.

And it is further ordered that the clerk of this court deliver to the United States marshal for the western district of Virginia six duly certified copies of this order, and it is ordered that the said marshal deliver in person a copy of said order to each of the said five freeholders named above and make return to this court of how he has executed the same.

19 *Order transferring case from Lynchburg to Charlottesville.*

(Filed June 17, 1912.)

In the United States District Court for the Western District of Virginia, at Lynchburg, Va.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PAUL BEATTY AND ALL OTHER PARTIES WHOM IT MAY CONCERN, defendants.	No. 2074.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* WILLIAM BROWN ET ALS. AND ALL OTHER PARTIES WHOM it may concern, defendants.	No. 2075.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* ALMA JACKSON ET ALS. AND ALL OTHER PARTIES WHOM IT may concern, defendants.	No. 2076.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* S. E. MACATEE ET ALS. AND ALL OTHER PARTIES WHOM IT may concern, defendants.	No. 2077.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LUCRETIA THOMPSON ET ALS. AND ALL OTHER PARTIES WHOM it may concern, defendants. } No. 2078.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CARRIE P. KUSER ET ALS. AND ALL OTHER PARTIES WHOM IT may concern, defendants. } No. 2079.

20 UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LUCY E. BARBEE ET ALS. AND ALL OTHER PARTIES WHOM IT may concern, defendants. } No. 2080.

It appearing to the court that the report of G. O. Leach, J. W. Donaldson, W. E. Lake, and Taylor F. Yates, four of the five commissioners appointed by order of this court of the 6th day of January, 1912, for the purpose of ascertaining and reporting a just compensation for the land in each of the above styled cases proposed to be condemned in these proceedings, and awarding damages, if any, resulting to the adjacent or other property of the owners, or to the property of any other persons, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said lands by the United States and converting it to its uses, as set out in the petitions in these cases, and was duly returned to and filed in the clerk's office of this court, at Lynchburg, Virginia, on the 29th day of April, 1912, together with the certificate of the officer administering the oath attached thereto; and it further appearing to the court that the defendants in said above-named cases, by counsel, have excepted to said report and filed their exceptions in writing to said report in said office on the 16th day of May, 1912, upon motion of counsel for defendants, it is ordered that said cases, which have been brought on to be heard together, be transferred from this court at Lynchburg to this court at Charlottesville, and there heard at the July term thereof, 1912, and the clerk of this court is ordered to transmit all the papers in these cases, and a copy of this order, from this court at Lynchburg to this court at Charlottesville.
(Seal.)
A copy teste:

STANLEY W. MARTIN, *Clerk.*
By LOUIS H. PRICE, *Deputy.*

21 *Report of Commissioners.*

(Filed April 29, 1912.)

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PAUL BEATTY AND ALL OTHER PARTIES WHOM IT MAY CONcern, defendants. } No. 2074.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* WILLIAM BROWN AND JAMES WILLIAM BUNDY AND ALL other parties whom it may concern, defendants.	No. 2075.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* ALMA JACKSON AND ROBERT H. JACKSON, HER HUSBAND, AND all other parties whom it may concern, defendants.	No. 2076.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* S. E. MACATEE, ROBERTA MACATEE EARLE, JOHN B. EARLE, her husband, Margie J. Macatee, and Sarah R. Macatee, and all other parties whom it may concern, defendants.	No. 2077.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* LUCRETIA THOMPSON AND SMITH W. THOMPSON, HER husband, and all other parties whom it may concern, defendants.	No. 2078.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CARRIE P. KUSER AND ALL OTHER PARTIES WHOM IT MAY concern, defendants.	No. 2079.
22 UNITED STATES OF AMERICA, PLAINTIFF, *vs.* LUCY E. BARBEE AND ALL OTHER PARTIES WHOM IT MAY concern, defendants.	No. 2080.

To the honorable District Court of the United States for the Western District of Virginia:

We, G. O. Leach, J. W. Donaldson, W. E. Lake, and Taylor E. Yates, four of the commissioners appointed by the District Court of the United States for the Western District of Virginia, to ascertain what will be a just compensation for such parts of the different tracts of land of the freehold whereof the said defendants in the above styled causes are tenants, and for such other property as is proposed to be taken by the United States, and to assess the damages, if any, resulting to the adjacent or other property of said tenants or owners, or to the property of any other persons, beyond the peculiar benefits that will accrue to such properties, respectfully, from the acquisition of the said tracts of land by the United States and converting it to its uses, as set forth in the petitions filed in the above-styled causes, do certify as follows:

First. That on the 25th day of March, 1912, the day designated in said order, we met together on the said land of which Paul Beatty

is the owner and tenant, the limits of which were then and there described to us as follows, to wit:

"Beginning at a stake at the end of a stone fence, a corner to Lauck and Downing and Richardson, thence with Downing and Richardson 7 lines, viz: south 74 east 18 poles to a stake in a ravine, thence south 11¼ west 22 poles to a stake in an old road, thence south 17½ east 22 poles to a stake on the bank of the road, thence south 35 east 28 poles, thence south 63 east 16 poles, thence south 36 east
23 12 8–10 poles to a stone pile, thence south 59 west 27.4 poles to a stake in a hollow, a corner to Garrett, thence down the branch north 61 west 27 poles to a poplar on the branch, corner to Garrett, thence south 60 west 38 poles to a stake on the south bank of the road, thence in the road south 33 east 23½ poles to a stake, a corner to Carrie Kuser, thence south 59 west 10 poles to a stake on the bank of Happy Creek, thence down the creek north 26 west 28 poles to a cluster of maples, thence north 3 west 20 poles to a large rock and elm and ironwood, thence north 60 west 8 poles, thence across the county road north 28 east 86 poles to the beginning, containing 30 acres and 54 square poles."

And it was further described to us that the fee simple of said tract of land last above described is to be taken by the United States for its purposes aforesaid, but that no other property of the said Paul Beatty is to be taken; and, after being duly sworn, upon a view of the land aforesaid, and of the adjacent and other property of the said owner, and of the property of other persons who will be damaged in their property by the acquisition of the said land last mentioned by the United States, and converting it to its uses, as aforesaid; and upon such evidence as was before us, we are of opinion and do ascertain that for the said land so taken (no other property is taken) fifteen dollars per acre will be a just compensation, and the damages to the adjacent and other property of said tenant or owner, and to the property of other persons who will be damaged in their property by reason of the acquisition of the said land by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such properties, respectively, from said acquisition of the said property by the United States and converting it to its uses as aforesaid, amounts to nothing, as there will be no damage to the adjacent or other property of said tenant or owner, or to the property of other persons.

24 Second. That on the 25th day of March, 1912, the day designated in said order, we met together on the said land of which William Brown and James William Bundy are the owners and tenants, the limits of which were then and there described to us as follows, to-wit:

"Beginning at a poplar and red oak on Happy Creek, a corner to Kenny and the Hockman mill lot and Hester Maddox, thence south 32 east 57 poles with Maddox's line to a sycamore 10 links beyond a pine stump on Happy Creek, thence north 12 east 16 poles, thence

north 24 west 16 poles to a sycamore, thence north 56 west 34 poles to the beginning, containing 3¼ acres."

And it was further described to us that the fee simple of said tract of land last above described is to be taken by the said United States for its purposes aforesaid, but that no other property of the said William Brown and James William Bundy is to be taken; and, after being duly sworn, upon a view of the land aforesaid, and of the adjacent and other property of the said owners, and of the property of other persons who will be damaged in their property by the acquisition of the said land last mentioned by the United States, and converting it to its uses, as aforesaid; and upon such evidence as was before us, we are of opinion and do ascertain that for the said land so taken (no other property is taken), five hundred dollars ($500.00) for whole property will be a just compensation and the damages to the adjacent and other property of the said tenants or owners, and to the property of other persons who will be damaged in their property by reason of the acquisition of the said land by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such properties, respectively, from said acquisition of said property by the United States, and converting it to its uses, as aforesaid, amounts to nothing, as there will be no damage to the adjacent or other property of the said tenants or owners, or to the property of other persons.

Third. That on the 25th day of March, 1912, the day designated in said order, we met together on the said lands, of which Alma Jackson and Robert H. Jackson, her husband, are the owners and tenants, the limits of which were then and there described to us as follows, to-wit:

First tract. "Beginning at a stake on the north side of the road, a corner to King, thence north 48 east 96 poles to a stone at the end of a fence, a corner to C. E. Barbee in King's line, thence south 52¼ east 63 poles to a pile of stone, thence south 6 east 27 poles to a stake by a pair of bars, thence south 29 east 27¾ poles to a stake, thence south 30½ west 59 poles to the center of the road, thence down the road north 43 west 11 poles, thence north 54 west 26 poles, thence north 64 west 54 poles, thence north 55 west 30 poles, thence north 32 west 14.2 poles to the beginning, containing 65 acres and 20 square poles."

Second tract. "Beginning at a stake, a corner to C. E. Barbee in Hockman's line, thence south 64¼ east 68.4 poles to a stake, a corner to Lucy Barbee, thence north 22 east 96 poles to the county road, thence north 32 west 14.2 poles, a corner to King, thence south 46 west 20 poles to an ash, a corner to the Water Company, thence north 32½ west 9 poles, thence north 74½ west 10 poles to the creek, thence north 25½ west 18 poles to a stone, corner to Butler, thence south 62 west 56 poles and 17 links, a corner to Grubbs and Butler, thence south 8 west 9 poles to a dogwood, a corner to Hockman, thence south 2 east 53 poles to the beginning, containing 43 acres and 100 square poles."

26 And it was further described to us that the fee simple of said two tracts of land last above described is to be taken by the said United States for its purposes aforesaid, but that no other property of the said Alma Jackson and Robert H. Jackson, her husband, is to be taken; and, after being duly sworn, upon a view of the lands aforesaid, and of the adjacent and other property of the said owners, and of the property of other persons who will be damaged in their property by the acquisition of the said lands last mentioned by the United States, and converting it to its uses, as aforesaid; and upon such evidence as was before us, we are of opinion and do ascertain that for the said lands so taken (no other property is taken). First tract, fifty-seven dollars per acre; second tract, forty-five dollars per acre, will be a just compensation, and the damages to the adjacent and other property of the said tenants or owners, and to the property of other persons who will be damaged in their property by reason of the acquisition of the said lands by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such properties, respectively, from said acquisition of said property by the United States, and converting it to its uses, as aforesaid, amounts to nothing, as there will be no damage to the adjacent or other property of the said tenants or owners, or to the property of other persons.

Fourth. That on the 25th day of March, 1912, the day designated in said order, we met together on said land of which S. E. Macatee, Roberta Macatee Earle, John B. Earle, her husband, Margie J. Macatee and Sarah R. Macatee are the owners and tenants, the limits of which were then and there described to us as follows, to wit:

"Beginning at a corner to Bierer and Waller, thence north 72 west 8 poles to the old Wapping Road, thence in said road 70 west 114 poles, thence south 47 west 18 poles to the Chester Gap
27 Road, thence down the road north 50 west 72 poles, thence north 46 west 32 poles, thence north 53 west 29 poles, thence north 28 west 11 poles to the Barbee line, thence north 52 east 100 poles to a large white oak and ash, thence north 11 east 59 poles to a stake, a corner to Dilger, thence south 84 east 154 poles to a stone pile, a corner to Brierer and Dilger's line, thence south 3¼ west 150 poles to the beginning, containing 215 acres."

And it was further described to us that the fee simple of said tract of land last above described is to be taken by the said United States for its purposes aforesaid, but that no other property of the said S. E. Macatee, Roberta Macatee Earle, John B. Earle, her husband, Margie J. Macatee, and Sarah R. Macatee is to be taken; and, after being duly sworn, upon a view of the lands aforesaid, and of the adjacent and other property of the owners, and of the property of other persons who will be damaged in their property by the acquisition of the said land last mentioned by the United States, and converting it to its uses, as aforesaid; and upon such evidence as was before us, we are of opinion and do ascertain that for the said land

so taken (no other property taken) sixty dollars per acre will be a just compensation, and the damages to the adjacent and other property of the said tenants or owners, and to the property of other persons who will be damaged in their property by reason of the acquisition of the said land by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of said property by the United States, and converting it to its uses, as aforesaid, amounts to nothing, as there will be no damage to the adjacent or other property of the said tenants or owners, or to the property of other persons.

Fifth. That on the 25th day of March, 1912, the day designated in said order, we met together on the said land of which
28 Lucretia Thompson and Smith W. Thompson, her husband, are the owners and tenants, the limits of which were then and there described to us as follows:

"Beginning at a point on the road, a corner to Lucy Barbee, thence with her line south 26¼ west 79 poles to a locust, a corner to M. C. Richardson, thence with his line south 72½ east 46¼ poles to a stake on the Bolen Road, thence in the road north 14¾ east 39 poles, thence north 27½ west 3 poles, thence north 27¾ east 6 poles, thence north 47¾ east 8 poles, thence north 18¾ east 12 poles to the Chester Gap Road, thence in the road with R. H. Jackson's lines north 73 west 14 poles, thence north 43 west 22 poles, thence north 54 west 18 poles to the beginning, containing 19 acres and 34 square poles."

And it was further described to us that the fee simple of said tract of land last above described is to be taken by the said United States for its purposes aforesaid, but that no other property of the said Lucretia Thompson and Smith W. Thompson, her husband, is to be taken; and, after being duly sworn upon a view of the lands aforesaid, and of the adjacent and other property of the owners, and of the property of other persons who will be damaged in their property by the acquisition of the said land last mentioned by the United States, and converting it to its uses, as aforesaid, and upon such evidence as was before us, we are of opinion and do ascertain that for the said land so taken (no other property is taken) sixty-two and fifty one-hundredth dollars per acre will be a just compensation, and the damages to the adjacent and other property of the said tenants or owners, and to the property of other persons who will be damaged in their property by reason of the acquisition of the said land by the United States and converting it to its uses, as aforesaid, beyond
the peculiar benefits that will accrue to such properties, re-
29 spectively, from the acquisition of said property by the United States, and converting it to its uses, as aforesaid, amounts to nothing, as there will be no damage to the adjacent or other property of the said tenants or owners, or to the property of other persons.

Sixth. That on the 25th day of March, 1912, the day designated in said order, we met together on the said land, of which Carrie P.

Kuser is the owner and tenant, the limits of which were then and there described to us as follows, to wit:

"Beginning at a white oak on the county road, a corner to Downing and Richardson and Byrd Rutherford, thence with Rutherford south 27 west 36 poles "to an ironwood and witchhazel on Happy Creek, a corner to Rutherford and Byrd Fletcher, thence down the creek north 71 west 8 poles, thence north 33 west 42 poles, thence north 29 west 16 poles to a stake on the bank of the creek, corner to Mrs. Brown, thence north 59 east 10 poles to the county road, a corner to Brown and Garrett and Downing and Richardson, thence up the road south 42 east 38 poles, thence south 86 east 19.4 poles to the beginning, containing 9 acres and 57 square poles."

And it was further described to us that the fee simple of said tract of land last above described is to be taken by the United States for its purposes aforesaid, but that no other property of the said Carrie P. Kuser is to be taken; and, after being duly sworn, upon a view of the land aforesaid and of the adjacent and other property of the owner, and of the property of other persons who will be damaged in their property by the acquisition of the said land last mentioned by the United States, and converting it to its uses, as aforesaid, and upon such evidence as was before us, we are of opinion and do ascertain that for the said land so taken (no other property is taken) nine hundred dollars for this property will be a just compensation, and the damages to the adjacent and other property of the said tenant or owner, and to the property of other persons who will be damaged in their property by reason of the acquisition of the said land by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of said property by the United States, and converting it to its uses, as aforesaid, amounts to nothing, as there will be no damage to the adjacent or other property of the said tenant or owner, or to the property of other persons.

Seventh. That on the 25th day of March, 1912, the day designated in said order, we met together on the said land of which Lucy E. Barbee is the owner and tenant, the limits of which were then and there described to us as follows, to wit:

"Beginning at a stake a corner to Smith Thompson on the county road, thence south 26¼ west 79 poles to a locust, a corner to Thompson and Richardson, thence with Richardson 3 lines, viz, south 23¾ west 33.2 poles to a stake, thence north 87¼ west 34 poles to a chestnut oak, thence south 1¼ west 66 poles to a cherry, a corner to Barbee, thence north 58 west 60 poles to a fallen chestnut, a stake on a hill, thence north 27 east 93 poles to a persimmon by the rock fence, corner to Barbee, thence north 64½ west 29.6 poles to a corner of Mrs. Jackson, thence north 22 east 96 poles to the county road, thence up the road south 55 east 30 poles, thence south 54 poles, thence south 54 east 18 poles to the beginning, containing 85 acres and 20 square poles."

And it was further described to us that the fee simple of said tract of land last above described is to be taken by the said United
31 States for its purposes aforesaid, but that no other property of the said Lucy E. Barbee is to be taken; and, after being duly sworn, upon a view of the land aforesaid, and of the adjacent and other property of the owner, and of the property of other persons who will be damaged in their property by the acquisition of the said land last mentioned by the United States, and converting it to its uses, as aforesaid, and upon such evidence as we before us, we are of opinion and do ascertain that for the said land so taken (no other property is taken) fifty-five dollars per acre will be a just compensation, and the damages to the adjacent and other property of the said tenant or owner, and to the property of other persons who will be damaged in their property by reason of the acquisition of the said land by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said property by the United States, and converting it to its uses, as aforesaid, amounts to nothing, as there will be no damage to the adjacent or other property of the said tenant or owner, or to the property of other persons.

Given under our hands this 6th day of April, 1912.

W. E. LAKE,
G. O. LEACH,
J. W. DONALDSON,
TAYLOR F. YATES,
Commissioners.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PAUL BEATTY, AND ALL OTHER PARTIES WHOM IT MAY CONCERN, Defendants. } No. 2074.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM BROWN AND JAMES WILLIAM BUNDY, AND ALL PARTIES whom it may concern, Defendants. } No. 2075.

32 UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ALMA JACKSON AND ROBERT H. JACKSON, HER HUSBAND, and all other parties whom it may concern, Defendants. } No. 2076.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
S. E. MACATEE, ROBERTA MACATEE EARLE, JOHN B. EARLE, her husband, Margie J. Macatee and Sarah R. Macatee, and all other parties whom it may corncern, Defendants. } No. 2077.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* LUCRETIA THOMPSON AND SMITH W. THOMPSON, HER HUSBAND, and all other parties whom it may concern, Defendants.	No. 2078.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CARRIE P. KUSER, AND ALL OTHER PARTIES WHOM IT MAY concern, Defendants.	No. 2079.
UNITED STATES OF AMERICA, PLAINTIFF, *vs.* LUCY BARBEE, AND ALL OTHER PARTIES WHOM IT MAY CONcern, Defendants.	No. 2080.

STATE OF VIRGINIA,

Warren County, to wit:

I, Bessie E. Edmonds, a notary public for the county aforesaid, do certify that G. O. Leach, J. W. Donaldson, W. E. Lake, Taylor F. Yates have this day made oath before me as follows:

First. That they will faithfully and impartially ascertain what will be a just compensation for such land of the freehold whereof Paul Beatty is tenant, and for such other property as is pro-
33 posed to be taken by the United States, for its purposes, and award the damages, if any, resulting to the adjacent or other property of said tenant or owner, and to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said land by the United States, and converting it to its uses, as set forth in the petition in the first above styled cause, and will truly certify the same.

Second. That they will faithfully and impartially ascertain what will be a just compensation for such land of the freehold whereof William Brown and James William Bundy are tenants, and for such other property as is proposed to be taken by the United States for its purposes, and award the damages, if any, resulting to the adjacent or other property of the said tenants or owners, and to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said land by the United States, and converting it to its uses, as set forth in the petition in the second above styled cause, and will truly certify the same.

Third. That they will faithfully and impartially ascertain what will be a just compensation for such land of the freehold whereof Alma Jackson and Robert H. Jackson, her husband, are the tenants, and for such other property as is proposed to be taken by the United States for its purposes, and award the damages, if any, resulting to the adjacent or other property of the said tenants or owners, and

to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said land by the United States, and converting it to its uses, as set forth in the petition in the third above styled cause, and will truly certify the same.

Fourth. That they will faithfully and impartially ascertain what will be a just compensation for such land of the freehold
34 whereof S. E. Macatee, Roberta Macatee Earle, John B. Earle, her husband, Margie J. Macatee and Sarah R. Macatee are the tenants, and for such other property as is proposed to be taken by the United States for its purposes, and award the damages, if any, resulting to the adjacent or other property of the said tenants or owners, and to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said land by the United States and converting it to its uses, as set forth in the petition in the fourth above styled cause, and will truly certify the same.

Fifth. That they will faithfully and impartially ascertain what will be a just compensation for such land of the freehold whereof Lucretia Thompson and Smith W. Thompson, her husband, are the tenants, and for such other property as is proposed to be taken by the United States for its purposes, and award the damages, if any, resulting to the adjacent or other property of the said tenants or owners, and to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said land by the United States, and converting it to its uses, as set forth in the petition in the fifth above styled cause and will truly certify the same.

Sixth. That they will faithfully and impartially ascertain what will be a just compensation for such land of the freehold whereof Carrie P. Kuser is the tenant, and for such other property as is proposed to be taken by the United States for its purposes, and ward the damages, if any, resulting to the adjacent or other property of the said tenant or owner, and to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said land by the United States, and converting it to its uses, as set forth in the petition in the sixth above styled cause, and will truly certify the same.

35 Seventh. That they will faithfully and impartially ascertain what will be a just compensation for such land of the freehold whereof Lucy E. Barbee is the tenant, and for such other property as is proposed to be taken by the United States for its purposes, and award the damages, if any, resulting to the adjacent or other property of the said tenant or owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the acquisition of the said land by the United States, and converting it to its uses, as set forth in the

petition in the last above-styled cause, and will truly certify the same.

Given under my hand this 25th day of March, 1912.

BESSIE E. EDMONDS,
Notary Public.

My commission expires on the 18th of June, 1914.

36 *Exceptions to commissioners' report.*

(Filed May 16, 1912.)

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PAUL BEATTY AND ALL OTHER PARTIES WHOM IT MAY concern, defendants. } No. 2074.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM BROWN AND JAMES BUNDY AND ALL OTHER PARties whom it may concern, defendants. } No. 2075

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ALMA JACKSON AND ROBERT H. JACKSON, HER HUSBAND, and all other parties whom it may concern, defendants. } No. 2076.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
S. E. MACATEE; ROBERTA MACATEE EARLE; JOHN B. Earle, her husband; Margie J. Macatee; and Sarah R. Macatee, and all other parties whom it may concern, defendants. } No. 2077.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LUCRETIA THOMPSON AND SMITH W. THOMPSON, HER husband, and all other parties whom it may concern, defendants. } No. 2078.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CARRIE F. KUSER, ALL OTHER PARTIES WHOM IT MAY *it may* concern, defendants. } No. 2079.

37 UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LUCY E. BARBEE AND ALL OTHER PARTIES WHOM IT MAY concern, defendants. } No. 2080.

To the Honorable District Court of the United States for the Western District of Virginia:

Each of the above defendants in each of the above-entitled cases, respectfully except to the report of G. O. Leach, J. W. Donaldson, W. E. Lake, and Taylor F. Yates, commissioners, appointed by the above-named court to ascertain what would be a just compensation for such parts of the different tracts of land of the freehold whereof the said defendants in the above-styled cases are tenants, which report was filed in your honorable court on April 29th, 1912, and except to the said report and show cause against the same on the following grounds:

First. Upon the ground that the act of Congress of the United States has never authorized the acquirement of the lands of the defendants by condemnation proceedings or by the exercise of the right of eminent domain, and that your honorable court is without jurisdiction in these cases, and has neither power nor jurisdiction to appoint said commissioners, or to take said lands by condemnation, and for want of jurisdiction in this honorable court to ascertain and maintain these proceedings, and to enter the order appointing said commissioners, and that the acts and reports of said commissioners are wholly without warrant or authority of law.

Second. That the damages awarded by the said Commission-
38 ers, to wit, to Paul Beatty of $15.00 per acre for 30 acres and 54 square poles; and to William Brown and James William Bundy of $500.00 for 3½ acres and building; and to Alma Jackson and Robert H. Jackson, her husband, for the first tract of 65 acres and 20 sq. poles, at $57.00 per acre, and for the second tract of 45 acres and 100 sq. poles, at $45.00 per acre; and to S. E. Macatee, Roberta Macatee Earle, and John B. Earle, her husband, Margie J. Macatee, and Sarah R. Macatee of $60.00 per acre for 215 acres; and to Lucretia Thompson and Smith W. Thompson, her husband, of $62.50 per acre for 19 acres and 34 sq. poles; and to Carrie Kuser, $900.00 for her house and 9 acres and 57 sq. poles of land; and to Lucy E. Barbee, $55.00 per acre for 85 acres and 20 sq. poles, for lands of said defendants which is sought to be condemned in these proceedings, is not a sufficient, just, or adequate compensation for said lands or any of them.

Third. That the order appointing said commissioners directed them "to ascertain what would be a just compensation for such parts of the different tracts of land of the freehold whereof the said defendants in the above-styled cases are tenants, * * * and to assess the damages, if any, resulting to the adjacent or other property of any other persons beyond the peculiar benefits that will accrue to the said property" was erroneous in this respect: That the land sought to be taken was the entire tract in each instance and not a part of a tract, and this erroneous order and direction to said commissioners, together with the action of the attorney for the United States in their contention before the commissioners, as to the effect

of these directions was misleading and confusing to said commissioners, and caused them to assess less damages than they might have otherwise done had they not have been so misled.

Fourth. That the said report of the commissioners as to the value of said land was not supported by the evidence, but was con-
39 trary to the evidence in that said commissioners refused to allow and award to certain of these defendants as much as witnesses swore they were willing to pay for the land; this is true as to part of the land of Alma Jackson and the Macatee land.

Fifth. These defendants excepting to the report of said commissioners and show cause against the same for the above reasons, and for other reasons to be assigned at the bar of the court and ask that said commissioner's report be not approved or confined.

PAUL BEATTY,
WILLIAM BROWN,
JAMES BUNDY,
ALMA JACKSON,
ROBERT H. JACKSON,
S. E. MACATEE,
ROBERT MACATEE EARLE,
JOHN B. EARLE,
MARGIE J. MACATEE,
SARAH R. MACATEE,
LUCRETIA THOMPSON,
SMITH W. THOMPSON,
CARRIE P. KUSER,
LUCY E. BARBEE.

By E. H. JACKSON, and O'FLAHERTY & FULTON,
Their attorneys.

40 *Bill of exceptions No. 2.*

(Filed August 9, 1912.)

In the United States District Court for the Western District of Virginia.

UNITED STATES GOVERNMENT
vs.
S. E. MACATEE, ET ALS.

Cases 2074 to 2080.

Be it remembered that upon hearing of the foregoing causes at Lynchburg, Virginia, on the 6th day of January, 1912, came the defendants to the above entitled action and demurred to the petition filed in these causes on the following grounds:

1st. That the said petition is not sufficient in law.

2nd. That there is no act of Congress or law of the United States authorizing the acquisition of the land and property mentioned in these proceedings by condemnation.

3rd. That the party or parties instituting said suit for and on behalf of the United States have no authority or warrant of law for so doing, and have not complied in commencing these proceedings with the laws in such cases made and provided.

4th. That this court hath no jurisdiction to entertain or maintain this suit, or lawful power to authorize the taking of the defendants' property by condemnation proceedings, and in the form, manner and way that said land is sought in these proceedings to be taken from the demurrants.

41 5th. That said proceedings are wholly without warrant or authority of law.

For these and other grounds of demurrer to be assigned at the bar of the court these demurrants pray the judgment of the court as to whether they shall be required to make any further or other answer to said petition and ask that the same be dismissed; which demurrer the court overruled and to which action of the court overruling said demurrer the defendants excepted and pray that this their Bill of Exceptions, No. 2, might be signed and sealed.

Notwithstanding the objection of counsel for the Government that it is now too late to sign this bill, it is now, on August 9th, 1912, signed and made part of the record.

HENRY C. McDOWELL,
District Judge.

42 *Order transferring cases from Charlottesville back to Lynchburg.*

In the United States District Court for the Western District of Virginia. Continued and held at Charlottesville on July 25, 1912.

U. S. *vs.* PAUL BEATTY, ET AL.
U. S. *vs.* WM. BROWN, ET AL.
U. S. *vs.* ALMA JACKSON, ET AL.
U. S. *vs.* S. E. MACATEE, ET AL.
U. S. *vs.* LUCRETIA THOMPSON, ET AL.
U. S. *vs.* CARRIE P. KUSER, ET AL.
U. S. *vs.* LUCY E. BARBEE, ET AL.
U. S. *vs.* ELLA S. KENNEY, ET AL.
U. S. *vs.* NEWTON GARETT, ET AL.
U. S. *vs.* MARTHA POMEROY, ET AL.
U. S. *vs.* JOHN SHIPE, ET AL.

It is ordered that these causes be transferred from this court at Charlottesville to this court at Lynchburg; and that the deputy clerk at Charlottesville transmit the papers, together with a copy of this order, to the clerk of this court at Lynchburg.

Copy teste:

STANLEY W. MARTIN,
By M. DINWIDDIE, *Deputy.*

In the United States District Court for the Western District of Virginia.

U. S. *vs.* PAUL BEATTY ET AL. } No. 2074.

U. S. *vs.* WM. BROWN ET AL. } No. 2075.

U. S. *vs.* ALMA JACKSON ET AL. } No. 2076.

U. S. *vs.* S. E. MACATEE ET AL. } No. 2077.

U. S. *vs.* LUCRETIA THOMPSON ET AL. } No. 2078.

U. S. *vs.* CARRIE P. KUSER ET AL. } No. 2079.

U. S. *vs.* LUCY E. BARBEE ET AL. } No. 2080.

U. S. *vs.* ELLA S. KENNY ET AL. } No. 2081.

U. S. *vs.* NEWTON GARETT ET AL. } No. 2082.

U. S. *vs.* MARTHA POMEROY ET AL. } No. 2083.

McDowell, district judge: In the act of Congress of March 3, 1911 (36 Stats., 1087, 1049), making appropriation for the support of the Army, is the following: "* * * including not to exceed two hundred thousand dollars for the purchase of land accessible to the horse-

raising section of the State of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service." The act of August 1, 1888, to authorize the condemnation of land for sites for public buildings and other purposes 25 States., 357; (6 Fed. Stats., Ann., 700, 703) reads as follows:

"That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under
44 judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

"SEC. 2. The practice, pleadings, forms, and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

The Virginia statutes relating to the procedure for condemnation "in like causes" are found in Va. Acts 1902–3–4, p. 957 et seq. (Code 1904, sec. 1105f.), and acts 1906, p. 452 et seq. (Code 1910, sec. 1105f.), in Code 1904, sec. 1105f (25) and sec. 15a. In brief, the procedure, so far as here of interest, is as follows: Notice, of which publication is made, is given by the party proposing to condemn to the land owner that the court will be asked to appoint commissions (five disinterested free-holders) to go upon the land, hear evidence, and thereafter report the compensation to be paid to the land owner. After the report is filed it is to be confirmed by the court unless good cause to the contrary be shown. If such cause is shown—if, for instance, the court, acting without a jury, on hearing the evidence, is of opinion that the amount awarded is excessive or inadequate—the report is set aside, and new commissioners are appointed.

45 In these cases the Virginia procedure was followed. On the hearing of the petition for the appointment of commissioners the land owners demurred. So far as I can recall the point chiefly relied upon was that the appropriation act of 1911, supra, did not authorize condemnation. The contention was that acquirement on voluntary sale by the owner was alone authorized by that statute. The case of Chappell vs. United States (160 U. S. 499) was not mentioned, and there was, I think, no contention that the act of 1888 did not authorize this court to follow the Virginia procedure—if the act of 1911 did not forbid condemnation. The demurrers were over-

ruled; commissioners (agreed upon by counsel) were appointed and in due time their reports were filed. To these reports sundry of the land owners filed exceptions and prayed that the reports be not confirmed. A time for the hearing on the exceptions was fixed and at Charlottesville, sitting without a jury, the court heard the evidence for both sides and took under advisement the questions on the merits. At this hearing the opinion in the Chappell case was called to my attention and two motions in behalf of the land owners were founded thereon. The first was in effect that these causes be dismissed. The theory being that the only permissible procedure in a condemnation by the Federal Government in a Federal court in Virginia is to disregard the State law and proceed ab initio before a common law jury. The second motion was in effect that the land owners be at least allowed a jury trial of the issue as to the adequacy of the amounts awarded by the commissioners. Both of these motions were overruled and the evidence was heard by the court.

(1) As briefly as possible I shall dispose of the contention founded on the use of the word "purchase" in the appropriation act of 1911.

When used in a statute the word purchase is frequently held
46 to include any method of acquisition other than by descent. (7 Words and Phrases 5853.) To construe the word here to only mean acquisition by buying we must assume that Congress had in mind the method of acquisition rather than the general purpose to acquire. The mere use of the word purchase—which may well have been used in its technical sense—is not to my mind a sufficient reason for such assumption. If, as we must, we give the members of Congress credit for a reasonable knowledge of human nature, they must have known that to restrict acquirement to voluntary sales by the owners would most probably defeat the chief purposes for which the appropriation was made. However, it seems to me that the first section of the act of 1888, supra, makes discussion unnecessary. The very purpose of that section was to authorize condemnation whenever, theretofore or thereafter, an act of Congress authorized land to be "procured" for public use. Surely no broader word than procure could have been used.

(2) Passing for the present the motion to dismiss, the contention that the excepting land owners were entitled to have the question of the adequacy of the amounts awarded by the commissioners tried by a jury will first be considered. The wording of the second section of the act of 1888, supra, was taken from the Conformity act of 1872 (914 Rev. Stats.) It is settled, of course, that this statute does not require a federal court to follow the State procedure where to do so would defeat the purpose or impair the effect of any Congressional statute. In following the State procedure in these cases, and hence in denying a trial by jury of the issue of fact raised as to the adequacy of the sums awarded, the purpose of section 566 Rev. Stats. was certainly defeated—if that statute was intended to apply to such cases. This statute was enacted originally by the first Congress in 1789. (1 Stats., p. 77.) It reads: "And the trial of issues of

47 fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." The language of section 566, Rev. Stats., is the same, except that a further exception in bankruptcy proceedings is added. In view of what is said in the opinion in the Chappell case, to which I shall advert later, it is with diffidence that I feel constrained to state that in my opinion this statute was not intended to apply to condemnation cases. It is to be noted that the statute does not read that all issues of fact in common law causes shall be tried by jury. And this omission was doubtless intentional. Issues of fact in contempt cases, for instance, were certainly not intended to be included. It is also a fact that issues of fact as to jurisdiction are frequently and permissibly tried by the court without a jury. (Wetmore vs. Rymer, 169 U. S. 115, 121; Globe Co. vs. Landa, 190 U. S. 540, 547. Disbarment proceedings are not tried by jury. Randall vs. Brigham, 7 Wall., 523, 530, 540.) A motion to set aside a verdict as being contrary to the evidence raises an issue of fact and many motions for continuance raise issues of fact, but such issues are never tried by jury. Issues of fact may arise in proceedings on habeas corpus, but no jury decides such issues. (9 Ency. Pl. & Pr., 1049.) We know then that it was not the intention to require that all issues of fact in common law causes be tried by the jury, and the conclusion which seems necessary is that the intention of Congress was that only those issues of fact which previous to 1789 had customarily and generally been tried by jury should thenceforth be so tried in the district courts. So far as the authorities now accessible enable me to learn, it appears that prior to 1789 condemnations by common law juries were certainly unusual and probably were wholly unknown. In Kehl vs. United States, (91 U. S. 367, 376), it is said: "The right of eminent domain was always a right at common law. * * * That it was not enforced through the agency
48 of a jury is immaterial; for many civil as well as criminal proceedings at common law were without jury." In 7 Ency. Pl. & Pr., 546, it is said: "Where the constitution is silent upon the question, the great weight of authority is that a common law jury is not a matter of constitutional right, inasmuch as a well settled practice existed both in England and in America, before the adoption of any of our constitutions, of ascertaining the compensation by means of other agencies than a common law jury." In 2 Lewis Em. Dom. (3d ed.) sec. 509 (311) it is said: "In the absence of any express constitutional provision on the subject, the authorities almost uniformly hold that it [right to jury trial in condemnation cases] is not a matter of constitutional right. The line of reasoning upon which these decisions are based is that, before any of our constitutions were adopted, it had been the practice in America and England to ascertain the compensation to be paid for property taken for public use by other agencies than a common law jury; that this practice was well known to the framers of those constitutions, and that presumably they did not intend by any general language employed to abrogate a practice so universal and of such long standing and against which no

complaint existed." It should here be noted that the Supreme Court has fully settled the proposition that the seventh amendment to the Federal constitution does not embrace condemnation cases in its preservation of the right of trial by jury. (Secombe vs. R. Co. 90 U. S. 198, 118; U. S. vs. Jones, 109 U. S 513, 519; Bauman vs. Ross, 167 U. S. 548, 593; Backus vs. Fort, 169 U. S. 557, 569.)

The same reasoning which leads to the conclusion that the 7th amendment to the Constitution does not embrace condemnation cases inevitably leads to the conclusion that condemnation cases were not intended to be embraced within the statute providing for jury
49 trials. The statute (1 Stats. 77 and 80) was enacted (on Sept. 24, 1789) by the same Congress which (on Sept. 29, 1789) proposed the adoption of the first ten amendments to the Constitution. Having full knowledge of the then long existing English and American practice of ascertaining damages in condemnation cases by other agencies than common law juries, they presumably "did not intend by any general language employed to abrogate a practice so universal and of such long standing and against which no complaint existed."

To my mind the ruling of the Supreme Court to the effect that the Constitution does not preserve the right to have issues of fact in condemnation cases tried by jury drives us to the conclusion that section 566 does not give such right. The Congress of 1789 was assuredly providing for jury trials in exactly the same cases, and only in the same cases, as those in which the right of jury trial was to be safe-guarded by the then proposed seventh amendment—common law cases in which trial by jury had previously been the customary mode of trial. Issues of fact arising in contempt cases, in disbarment proceedings, on habeas corpus, and in sundry motions (and, by the same token, in condemnation cases) were not intended to be thenceforth tried by jury; because such had not theretofore been the usual method of trial of such issues. In Black Interp. Laws (p. 233) it is said:

"Whether the statute affirms the rule of the common law on the same point or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law, for in this way alone it is possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law. 'The general rule in the expo-
50 sition of all acts in Parliament is this: That in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; and therefore in all general matters of law presumes the act did not intend to make any alteration, for if the Parliament had had that design, they would have expressed it in the act.'"

See also Shaw vs. R. Co., 101 U. S., 557, 565.

However, it is insisted that the case of Chappel vs. U. S. (160 U. S., 49) requires that Federal condemnation cases in the Federal courts be tried before a jury. The Maryland statutory procedure for condemnation, which is analogous to the Virginia method, is stated in the opinion at pages 511–12. In brief a jury of twelve is formed who set out of the presence of the court and return and file their inquisition or award. If the court approves the ward, it is confirmed; or, if good cause therefor be shown, the award is set aside and the court directs another inquisition. In trying the case the district court of Maryland so far departed from the State practice as to have a jury of twelve men from the regular panel hear the evidence in court under the supervision and direction of the judge. Practically the only concession, if any, made to the requirements of the State law was that a panel of twenty veniremen was presented, and each side was allowed to strike off four names.

Chappel's contention in the Supreme Court is thus stated in the opinion (p. 512):

"The only position, other than the denial of the constitution-
51 ality of the act of Congress, argued by the plaintiffs in error in this court, was that by the statutes and decisions of Maryland the jury which returned the inquisition was but a body of assessors of damages, in the nature of a special jury of inquest, or board of commissioners, and that he was entitled to have the whole case tried anew by an ordinary jury. In support of this position were cited the following cases, decided under different statutes of Maryland: Tide Water Canal Co. vs. Archer, 9 Gill & Johns, 479; Steuart vs. Baltimore, 7 Maryland, 500; State vs. Graves, 19 Maryland 351. But however that may be under the statutes of the State, it is not so under the act of Congress."

On this branch of the case the opinion concludes (p. 514):

"This plaintiff in error had the benefit of a trial by an ordinary jury at the bar of the district court on the question of the damages sustained by him; and he was not entitled to a second trial by jury except at the discretion of that court or upon reversal of its judgment for error in law."

In the opinion Mr. Justice Gray (p. 512) assumed that the Maryland decisions supported Chappell's contention as to the State procedure, and the entire point of his argument in that the conformity provision of the act of 1888 does not require the Federal court to so closely follow a cumbrous, expensive, and dilatory State procedure as to allow a second jury trial to a land owner who had already had a regular common law jury trial.

"Such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States" (p. 514).

It is undeniably true that Mr. Justice Gray expressed the opinion (pp. 513–14) that the Federal statutes (secs. 566 and
52 648 R. S. being intended) require that Federal condemnation cases in the Federal courts must be tried by a common law

jury. But it is manifest that the appeal of a land owner who without objection had had a common law jury trial did not and could not present for decision this question. The question presented by Chappell's contention was: Does the conformity provision of the act of 1888 require the Federal trial courts to follow an alleged State procedure which allows a land owner who has had one common law jury trial to have a second jury trial? If in dealing with this question a judge in passing says that the Federal statutes require one jury trial, such statement is necessarily a dictum. No such question was in issue. Chappell had been allowed one jury trial. That case could not have raised for decision the questions we are concerned with unless Chappell had objected to allowing a common law jury trial in the first instance. While great weight is and should be given to the dictum found in the Supreme Court opinions, it is the clear duty of the subordinate courts to decline to follow any mere dictum, if, after careful consideration, it is believed to be erroneous.

If I am right in reaching the conclusion that section 566 R. S. does not embrace condemnation cases, there is no Federal statute which requires a jury trial in condemnation cases. There is, therefore, no reason why in these cases the direction of the second section of the act of 1888 should not have been observed and the State procedure followed, unless by so doing we were following a procedure which unnecessarily encumbers the administration of justice in the Federal courts. No such charge can be made against the Virginia procedure. In a great many condemnation cases in this State both parties accept the award made by the commissioners and there is no trial in court at all. If the procedure under the law of this State were, as Chap-
53 pel argued that Maryland procedure was, such that it provided for a jury trial de novo on exceptions to the commissioners' report, it might be necessary to consider the proposition that such a procedure unwisely encumbers the administration of justice.

The contention that commissioners should not have been appointed at all and that these proceedings should have been started as common law cases to be tried only before a common law jury, has in effect been disposed of by what has been said. If section 566, R. S., does not require that issues of fact in condemnation cases be tried by jury, and if in following the Virginia procedure we do not unwisely encumber the administration of justice, there is absolutely no reason or excuse for a total and absolute disregard of the direction in the act of 1888 to conform as near as may be to the procedure in like cases in the State courts. The Constitution does not give a right to a jury trial in condemnation cases; no Federal statute (if my reasoning be sound) gives such right; no Virginia statute gives it. For a Federal court in this State to try a Federal condemnation case before a jury is simply to deny to the party who objects to such methods of trial a right given by the second section of the act of 1888. In the trial of Chappell's case the trial court's order (p. 502) expressed the opinion that the question of damages ought to be submitted to a jury. But there is nothing in the report of the case to show that this was not agreed to by both parties.

(3) On the hearing of the exceptions objection was made by the exceptants to allowing the commissioners who made the reports to testify. I am unable to think of any rule of law which would make the commissioners incompetent. In Hunter *vs.* R. Co. (107 Va., 158, 162), the commissioners testified. In 2 Lewis Em. Dom. (3 ed.), sec. 652 (433), it is said: "In regard to the competency of witnesses
54 the general rules apply."

(4) Subject to objection, I heard testimony as to prices paid by the Government to adjoining landowners for land somewhat similar to the tracts here in controversy. The best conclusion I can reach is that the weight of authority supports the objection of the exceptants. (2 Lewis Em. Dom., sec. 667 (447); Mills Em. Dom., sec. 170). So far as appears the landowners who sold to the Government may have been influenced by fear of condemnation. In reaching my conclusion on the merits I disregard the evidence referred to.

(5) Some of the witnesses were asked by me to state the value without regard to the fact that the Government wanted the land. While no exception was based on this fact, it may be well to note that in Five Tracts of Land *vs.* U. S. (101 Fed., 661, 665), this theory is expressly approved.

(6) After careful consideration I have concluded that I should confirm the reports in each of these cases. No attempt will be made to discuss the evidence in detail. A very considerable number of honest witnesses have expressed opinions to the effect that the land is worth considerably more than the commissioners have reported. Opinion evidence is advisory only and is not binding. (The Conqueror, 166 U. S., 131 et seq.) The commissioners in these cases were agreed upon by the parties. The impression made upon me by their appearance and demeanor upon the witness stand was most favorable. There has been no suggestion of any improper influence brought to bear upon them. To my mind they undoubtedly intended to award full and fair compensation. The weight to be given to their reports, under both the general authorities and under the Virginia decisions, is such that I can not in any of these cases find sufficient reason for refusing to confirm.

In Hunter *vs.* R. Co., supra (107 Va., 158, 170-1), is the following:

55 "In Cranford Paving Co. *vs.* Baum (97 Va., 501, 24 S. E., 906), this court said: 'When it becomes necessary to ascertain what is just compensation for land taken for public use, as in the present case, the statute directs that the court shall appoint five disinterested freeholders as commissioners to perform this duty, and requires that in its performance they shall themselves view the land so taken. The law lays great stress upon the matter of the view and justly attached great weight to the report of the commissioners. They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself which is taken and judging as to its value. * * * They have, as they also had here, after having their attention especially drawn to the element of damage relied upon, the opportunity to apply the

evidence produced before them to the subject of the controversy and to determine the weight to be given to its several parts. We are without the benefit of their opportunities and of what they saw and were the judges, and it should be a very clear case, indeed, of inadequate compensation to justify the court in disturbing their sworn, deliberate, and disinterested judgment as disclosed in their report."

In Shoemaker *vs.* United States (147 U. S., 262, L. Ed., 13 Sup. Ct., 361), the opinion, quoting from Mills on Em. Dom., says: "An appellate court will not interfere with the report of commissioners to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises and this evidence cannot be carried up so as to correct
56 the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages, there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions."

See also the recent case of Tidewater Ry Co. *vs.* Cowan (100 Va., 817, 56 S. E., 819).

See also 7 Ency. Pl. & Pr., 613–14; 15 Cyc., 905 et seq.; 2 Lewis Em. Dom., sec. 776 (524); Columbia Co. *vs.* Rudolph, 217 U. S., 547, 560; 5 Ency. Ev., 248; R. Co. *vs.* Pack, 6 W. Va., 397.

HENRY O. MCDOWELL,
District Judge.

AUG. 9, 1912.

57 *Assignment of errors in cases 2076 to 2077, 2709, and 2080.*

(Filed August 9, 1912.)

In the United States District Court for the Western District of Virginia.

UNITED STATES GOVERNMENT
vs.
PAUL BEATTY, ET AL.

No. 2074 and Cases 2075 to 2077 and 2079 to 2080.

The defendants hereby make the following assignment of errors, to accompany and be filed with their petition for writ of error to the judgment of the court in this cause:

I.

The court erred in not granting the motion of the defendants to dismiss the petition for the reasons set out in writing, which were as follows:

1st. That the said petition is not sufficient in law.

2nd. That there is no act of Congress or law of the United States authorizing the acquisition of the land and property mentioned in these proceedings by condemnation.

3rd. That the parties instituting said suit for and on behalf of the United States have no authority or warrant of law for so doing.

58 4th. That this court hath no jurisdiction to entertain or maintain this suit, or lawful power to authorize the taking of the defendants' property by condemnation proceedings, and in the form, manner and way that said land is sought in these proceedings to be taken from the defendants.

5th. That said proceedings are wholly without warrant or authority of law.

II.

The court erred in overruling the demurrer and each and every ground thereof interposed by the defendants to the petition filed in this cause, which grounds were set out in writing and are the same as given above in assignment of error number 1. We contend that the demurrer shows that the United States Government has not the right to institute condemnation proceedings against the defendants, as the act of Congress on its face shows clearly that it was never intended to acquire the lands in any other way than by purchase from the owners.

III.

The court erred in overruling the motion of the defendants to instruct the commissioners as follows:

In determining what is just compensation for said land, the commissioners are instructed to take into consideration the full value of the property for the most advantageous use to which it may be applied, and to take into consideration every other element of value, which would be taken into consideration in a sale of the land between private parties or by persons desirous of selling to persons desirous of buying the same, both freely exercising prudent and intelligent judgment as to its value, and shall assess the full value thereof, and report the same to the court, together with the evidence upon which the said report was based.

59 IV.

The court erred in not granting their motion at Charlottesville on July 1st, 1912, to impanel a jury to ascertain what was a proper and just compensation for the lands sought to be taken by the United States Government for the purposes set out in the proceedings, the Statutes of the United States giving them that right.

V.

The court erred in not granting the defendants' motion made at Charlottesville on July 1st, 1912, to impanel a jury to try the issues of fact made up by the exceptions to the commissioners' report as to what was a just compensation for the lands sought to be taken by the United States Government for the purposes set out in the proceedings.

VI.

The court erred in not sustaining the written exceptions to the commissioners' report filed on the 29th day of April, 1912, which exceptions were as follows:

"First. Upon the ground that the act of Congress never authorized the acquirement of the land of these defendants by condemnation proceedings or by the exercise of the right of eminent domain, and that your honorable court is without jurisdiction in these cases, and has neither power nor jurisdiction to appoint said commissioners, or to take said lands by condemnation and for want of jurisdiction in this honorable court to entertain and maintain these proceedings, and to enter the order appointing said commissioners, and that the acts and reports of said commissioners are wholly without warrant of authority of law.

60 "Second. That damages awarded by said commissioners to each of these defendants for his land, which is sought to be condemned, is not a sufficient, just, or adequate compensation for said lands or any of them.

"Third. That the order appointing said commissioners directing them 'to ascertain what would be a just compensation for such parts of the different tracts of land of the free-hold whereof the said defendants in the above styled causes are tenants, * * * and to assess the damages, if any, resulting to the adjacent or other property of any other persons, beyond the peculiar benefits that will accrue to such properties.' And in this respect the said order was erroneous in that the land sought to be taken was the entire tract and not a part of a tract, and this erroneous order, together with the action of the attorneys for the United States, had the effect of misleading said commissioners as to the amount of damages to assess for the land taken from each of these defendants.

"Fourth. That the said report of the commissioners as to the value of said lands was not supported by the evidence, but was contrary to the evidence, in that, that said commissioners refused to allow certain of these defendants as much as the witness, who went upon the stand offer, then and there, to pay for said land."

VII.

The court erred in allowing the commissioners, who made the reports, to testify before the court in the hearing on the exceptions to the commissioners' report at Charlottesville on July 1st, 2nd, and 3rd, 1912. We contend that the commissioners were incompetent witnesses to testify as to a judicial decision which they had rendered.

61 VIII.

The court erred, after having heard the testimony as to the value of the lands sought to be taken in not sustaining the exception to the commissioners' report as to the value of the lands taken, it being con-

tended that the compensation for the lands taken is not full, adequate, or just, as is required both by the laws of Virginia and the statutes and the Constitution of the United States.

IX.

The court erred in entering the order of August 9th, 1912, confirming the commissioners' report, because

(a) It does not appear in the proceedings that the act of Congress under which these proceedings were had have been complied with.

(b) The court had no jurisdiction to condemn lands under the act of Congress under which these proceedings were had.

(c) The court was without jurisdiction to act, sitting as a jury in the trial of a question of fact.

(d) The proceedings had in this case were contrary to the laws and Constitution of Virginia and the United States in that the defendants have not had due process of law in the taking of their property.

(e) By the conformation of the commissioners' report the defendants are not allowed that just, full and adequate compensation to which they are entitled by virtue of the laws of Virginia, the statutes and Constitution of the United States.

Wherefore, for these and other errors appearing upon the record the defendants pray that the judgment of the District court of
62 the United States for the Western District of Virginia may be reversed, the order entered on the 9th day of August, 1912, be set aside, and such other relief granted as to the court seems proper.

WM. BROWN,
JAS. W. BUNDY,
CARRIE P. KUSER,
LUCY E. BARBEE,
ALMA JACKSON,
ROBT. H. JACKSON,
PAUL BEATTY,
S. E. MACATEE,
ROBERTA MACATEE EARLE,
JOHN B. EARLE,
MARGIE J. MACATEE,
SARAH R. MACATEE.

O'FLAHERTY, FULTON, & WALLER, and E. H. JACKSON,
Counsel.

63 *Memorandum giving dates of petition for writ of error, order granting writ of error, penalty, names of the obligors, condition of the appeal bonds, date of the citation, date of waiver of service.*

The petition for writ of error, date of order granting writ of error, date or writ of error, date when copy thereof for opposing party was filed in the clerk's office of this court, August 9th, 1912.

Date of bond, August 20, 1912.

Penalty, $5,000.00.

Names of obligors, Alma Jackson, Lucy E. Barbee, Paul Beatty, and the Fidelity & Deposit Company of Maryland, Baltimore, Md.

Condition of the appeal bond is that if the said Alma Jackson, Lucy E. Barbee and Paul Beatty and others shall prosecute a said appeal to effect and answer all damages and costs if they fail to make their plea good, and pay and abide the further order of this court in said cause, or if the United States Circuit Court of Appeals for the Fourth Circuit to be entered in the appeal proceedings, then the above obligations to be void; otherwise to remain in full force and virtue.

Date of citation, August 9th, 1912.

Date of waiver of service, August 9th, 1912.

64 G. W. KOINER.

In the United States District Court for the Western District of Virginia at Lynchburg on Nov. 9, 1912.

Bill of Exception No. 4.

UNITED STATES
vs.
PAUL BEATTY, ET AL. } No. 2074.

UNITED STATES
vs.
ALMA JACKSON, ET AL. } No. 2076.

UNITED STATES
vs.
LUCY E. BARBEE, ET AL. } No. 2080.

Be it remembered that upon the trial of this case, and after the commissioners had reported, each of the above defendants, in each of the above-entitled causes excepted to the report of the commissioners, which exceptions were filed on May 16th, 1912, upon the grounds shown in said report, whereupon, at the hearing held at Charlottesville on July 1, 1912, the defendants to maintain their exceptions introduced the following witnesses, to wit: G. W. Koiner, J. L. Phillips, John B. Earle, Geo. W. Settle, Jos. Reid, Geo. W. Kinsey, James Fletcher, C. B. Silman, Frank D. Wood, A. F. Corran, J. M. Lake, J. M. Stickley, N. S. Waller, Paul Beatty, I. L. Beatty, Miss Lucy Barbee, Miss Carrie Kuser, R. H. Jackson, Smith Thompson, L. B. Moore, T. V. Leach, A. W. Dearing, John M. Johnson, Byrd Fletcher, and the United States Government introduced the following
65 witnesses: W. E. Lake, G. O. Leach, A. L. Warthan, T. F. Yates, J. W. Donaldson, Robert Leach, Capt. Conrad, John M. Johnson to sustain the report of the said commissioners, which

testimony was reduced to writing and afterwards put into a condensed and narrative form, and which is as follows:

Evidence in a condensed and narrative form.

G. W. KOINER, a witness on behalf of the landowners, testified as follows:

"I am now and have been commissioner of agriculture of the State of Virginia for twelve years; I am acquainted with the community near and around Front Royal; I had been on the land in question in these proceedings, and spent a day going over it the week preceding; the different tracts were pointed out to me—the Macatee tract, the Barbee tract, and the Jackson tract; the soil is very good; that a good deal of it is what is called Hagerstown loam; that some of it might be classed as black Carter loam, Albemarle pippin land; that it is a fine class of soil, extra good soil, deep, dark brown color, one of our best soils, most productive soils for fruit, and good grazing soil; that it is extra for fruit, particularly apples, but will grow all kinds of fruit; the main crop in Virginia being apples. Part of that land will grow Albemarle pippins, first rate, fine quality pippins. I am well acquainted with the subject of the pippin lands in Virginia; that the area that is good for Albemarle pippins is very limited in Virginia. It is confined to the Alleghany Mountains, the disintegration of the feldspathic rock formed in ages around Albemarle and the Blue Ridge, where the mountain is broken up, that is the
66 only pippin land that we have. It grows the Albemarle pippin of the highest flavor; it is the best seller and the highest-priced apple in the world, in this country or foreign markets. The area of soil is quite limited in the State. I don't know the number of acres confined to that. The State Horticultural Society has platted a map, as far as able, locating the area, and finding it very small; the land in question is in Warren County. The price varies according to the crop of apples, but these apples usually sell for several dollars a barrel more than other apples. I was born and raised in Virginia, and know something of the various soils we have in Virginia; observed the character of blue grass that was on this land; don't know the exact amount of blue grass land in Virginia, but it is confined to special localities, the territory contiguous to the Blue Ridge and Alleghany. The best blue-grass sections are those in the mountains of Fauquier and Warren, as you go up the Blue Ridge up to the southwest, Pulaski and Tazewell, and counties in that section. Blue grass likes cool soil like the apple; that the feldspathic soil gives quality and color to the apples; the Virginia apples are superior to apples of almost any other State. That the land, such as the land in question, sells around Winchester as high as $150.00 per acre. This land is four miles from Front Royal, where they have the Southern and the Norfolk & Western Railroads, and the river; that the road between this land and the railroad station at Front Royal is a splendid macadam pike; that it is down grade from this land to the station practically.

"That the country in question is broken up, rolling hills on the side of the mountain; that it is in the gap leading from Warren into Rappahannock; there is a road running from Front Royal over into Rappahannock; that the contour of the country is gradually broken up by ridges and little valleys, and there is a stream that runs
67 down that little valley. This pike runs up that valley and this land faces it on each side. The hills are rolling, some a little steep, and some a little too steep for orchard purposes; is very good for grazing and well watered. The Macatee is better sod than the other, seemed to be better grazing land, it is quite good fruit land, unusually good fruit land; it is not often you find land as fine as that and as well located, close to market, and a good road and good situation, that is offered for sale. The land is worth, I would say it was too cheap at $75 an acre, and I don't think $100 an acre would be an extravagant price at all."

The witness was then questioned by the court said:

"Q. All three tracts or the Macatee tract?

"A. The three tracts. I think the Macatee is worth more than the other; it is better sod than the other.

"The COURT. What did the commissioners put this at?

"Mr. JACKSON. The Macatee land was put at $60. The Alma Jackson tract was in two parcels, one at $57 and the other at $45; the lower Barbee land at $55."

Witness then continued to answer questions by counsel, and does not know exactly what the elevation of the land is, nor exactly how far it is from Washington City, but about three hours' run. (It was then agreed by counsel that the exact distance was 86 miles.) That there are no other breaks in the mountain near there except this one known as Chester Gap, and the next below known as Manassas Gap.

In answer to questions by the court the witness further testified:

"Fruit culture has been carried on in this community, but I did not go near the orchards; that the apple business has developed
68 very lately in this State; that there is more inquiry for that kind of first-class fruit land each year; that it is growing; that the fact that Virginia has such fine fruit-growing soil is becoming known outside of the State. People now of considerable means are coming to Virginia, and by being commissioner of agriculture I have opportunity of knowing the people are selling out orchards in Oregon and Washington, which are claimed to be the best apples in the world, and coming to Virginia. They are finding out that their first orchards out there are reaching their decline. They haven't the promise of long life like our Virginia trees. We have trees in Virginia 100 years old that are bearing apples. That adds to the value of the apple soil in Virginia, and I believe our apple lands will increase in value for the next 50 years to come."

Cross-examination in answer to Mr. GILLESPIE:

"I can not name the commercial orchards in that section. There may not be any, but there are apple trees on that land; saw no large

orchard on the land; saw an orchard across the way, but I did not go into it, a nice-looking orchard, a young orchard. I would not say that this is a thin blue-grass sod. It is nothing like the blue-grass sod that we have in southwest Virginia, it is a right good sod; would not consider it among the thin blue-grass sods; would call it a thin sod compared with the blue grass in Tazewell and Russell. Can find in the blue-grass section of the State thinner sod in many counties; I thought it was pretty good blue grass, good grazing. On the right-hand side, as you go up further, it was first rate; would not put it below the average blue-grass sod of Virginia. Do not know that I can think of a place where you can find a section of blue-grass sod in the State of Virginia that is thinner."

69 By the COURT:

"Q. Are you familiar with Tazewell County?

"A. Yes, sir. It is not as good as Tazewell. Some of the finest blue-grass sod I have seen in this country is in Tazewell."

In answer to Mr. GILLESPIE:

Do not know any sections in Russell, Pulaski, Fauquier, or Clarke Counties, except farms occasionally, as good as Tazewell land; can find a farm occasionally as good; could not mention definitely any section in the bluegrass lands of Virginia that is thinner than the Happy Creek country. It is grazing land, and a good deal of grazing land is rough and steep. This is a little steep; not too much so for grazing. Most, I think, of that section raises fruit on it.

"Q. But there isn't any of it through that section but what is pretty steep and pretty rough, is it?

"A. I wouldn't make as strong a statement as that. There is a great deal of land in Virginia that is cultivated steeper than that; some is right steep.

"I wouldn't call it mountains. The ridges and breaks are pretty abrupt, but it comes up pretty steep, and the valleys, where you do have a valley, are very narrow. You come down one ridge and strike a very narrow valley, and up another; some goes up a long sloping valley; some are very abrupt. Some of the land is a good deal thinner. The character of the soil is generally the same all through there. Some farms have been harder run than others. Some of the land is pretty rocky. The Macatee property has been taken better care of than the other. That place on the right going up has not good blue grass on it; it seems to have been harder cropped; the grass has been nipped off as it came out and it has been losing
70 sod very much; it seems to have been badly treated; don't remember which tract this was. Witness here shown a map. Says that field across there (Jackson tract) seems to have been pastured the previous year. I was not acquainted with the land previous to going there; I rode over the land on horseback; I rode over all these three tracts; spent a good part of the day; had a late dinner when we came in. I went out directly after breakfast and rode all

over here [indicating], and got back, I think, to late dinner. Went from Mr. Waller's after breakfast, and got back for late dinner,—I say late dinner,—it might have been in the middle of the day and it might have been a little after; I don't remember the time. These lands were used for grazing. There was one plowed field on one with corn and cabbage and truck. A good deal of it does not lie well for cu'tivation. I want to qualify that. There is a good deal of land steeper than that is cultivated. I do not know the size of the field that is cultivated, just a small field at the foot of the hill. It is not very good to cultivate land as steep as that. The principal use to which this land is being put is for grazing purposes, and that is usually the most profitable way to use land to raise stock; that to prepare a steer that weighs from 1,000 to 2,000 pounds for market off that grass it would take three or four acres, perhaps three would do; that it takes mighty good sod of three acres to fatten a steer; some of it is pretty good sod; it depends upon the season; some of it would not take that much and some of it would require more. The Macatee tract was all cleared up; seemed to be in pretty good fix; but there is some woodland on it; do not know how much. I do not know the rental value of these lands and I do not know the market value of these lands in the past. Lands in this State in the last ten years have doubled, on an average, all over the State. I be-
71 lieve they will double again in the next ten years. I doubt if land located like that is, as fine fruit land as that is, can be bought at $75.00 in Virginia. I don't know of but very little land in the State that can beat that as fruit land. That character of land is going to advance very rapidly in the future, because there is so little of it. You can't make that kind of land; you can't take other land that is thin and unsuitable and make fruit land of it. Nature has to do that. I have taken into consideration both the present value and its investment value, what it would bring now, and a man in buying would, of course, take into consideration its future value also. This land has not been used for fruit purposes. There are trees scattered all over, very vigorous, and looked very good for trees that have had nothing but what nature has done for them. It shows nature has taken very good care of them all these years; fought off insects; no cultivation; good, large, healthy-looking trees. The public is finding out outside of the State that we have got land in Virginia that will do that. Out West you plant a tree like that; it wil' go down and never get a bushel of apples from it. These trees have borne good crops. Apple crop is rather a recent enterprise in Virginia; it is on a boom; growing very rapidly in its infancy; it isn't an experimental state; there is not an iota of experiment about it. It *It* has been tested thoroughly. This is one of, if not the best, apple-growing States, and that it is a good business has been proved by those who are pioneers in it. Let me give an illustration: At Waynesboro Mr. Craig has an orchard in my county. I remember when it was set out; it is about 23 or 24 years old. People in the neighborhood thought that man was going wild, putting all that money in

apple trees, and never would make anything of it. He has made good there. Year before last he had a fine crop, and, to test it himself, he measured out five acres he thought was the bast in that
72 orchard and kept an account of sales, and it averaged $1,480.00 to the acre. That is what he did, not what could be done. He made just as good a crop last year. In fixing the value on this land I attach considerable importance to the fact that it is good fruit land; it is worth more for fruit land than anything else. I do not know whether this land has been offered for sale or not, but I believe that all land like that will be in fruit in the near future. I took into consideration what it is worth now and its prospective value. I can not separate its value as mere grazing land from its value as fruit land. Strictly as a grazing farm, of course, a man who would buy that could use it for various purposes.

"I do not know how far the Macatee land is from the top of the Blue Ridge Mountain, nor how much land is in sod; I can not tell the value of the timber, nor how much is uncleared. The Jackson land looks as if it had been hard pastured; looks as if it had been pastured in the spring when the grass was coming up, and kept nipped down. The daisies had come up and gotten ahead of it. The land had good color and looked well, like the other, but land, when the grass starts out in the spring, if it is hard pastured it injures it in a season. There is some bottom land in that Thompson land; I do not know if it is marshy; I didn't go on it; if it is, it can be easily drained; there is a branch there that can drain it."

Redirect examination by Mr. O'FLAHERTY:

A little of the land is not good for cultivation in some of the steepest places. It is of such a character that an orchard could be put on. There are orchards that are never cultivated. I do not recommend that as a proper way so much, but on steep lands they are put
73 in sod and left there to prevent washing. I know orchards a good deal steeper than that in Albemarle, but the lands spoken of, belonging to Mr. Craig, are a great deal richer and cultivate fruit better.

Recross-examination by Mr. GILLESPIE:

I can tell good fruit land by the looks of the soil and the character of the soil and from the reports made on that soil of that section, and experts that have examined these soils of that section, and the simularity with other soils that are growing fine apples. Reports is one consideration and seeing it another. I know good soil when I see it.

By the COURT:

I can tell feldspathic soil from others if there is a good deal in it. There is no doubt in my mind that this is feldspathic soil, and I regard it as the best. The rocks show where it came from. That is very evident. (In answer to a question by the court, who said he had read a good deal in magazines about the apple interest being overdone.)

A. I feel sure that this is not the case and never will be the case in these sections where nature has favored most for apple growing. As the production of apples increases the public will discriminate more between the quality of apples, they will learn to know good from bad apples, and good apples will sell well and *and* bring greater price. But the public has exaggerated that view. Our last census showed there were fifty million less bearing apple trees now than ten years ago. It is just the commercial orchards, where the proper attention has been given to the cultivation of the orchards and spraying, that have escaped disease and insects and become profitable.

Where the average farmer neglects his trees they go down,
74 and fifty million bearing trees have gone down in the last ten years; we have that many less bearing trees now than ten years ago. Another thing that can not be denied is the fact that these money makers, successful fruit growers, in Washington and California are selling their apple lands at two to three thousand dollars an acre and coming to Virginia to buy land to set out apple orchards. I know these facts of my own knowledge, and I get inquiries constantly, and these men turn up in my office to get information about the fruit section of the State. It is not a fact that there is a vast quantity of feldspathic lands in the Blue Ridge lands in comparison with the demand for apple-growing purposes. The quantity is very limited.

By the COURT:

"Q. In comparison with the demand for it?

"A. The demand is taking it up, and I believe it will be all taken up before that demand is satisfied. There are other sections of the State where other varieties of apples are grown outside of this feldspathic formation, but that is the formation that grows the Albemarle pippin, the highest-priced apple."

I have always tried to fight against exaggeration or to get enthused beyond what the facts will bear out, because I never want to mislead a homeseeker, and I never have been charged with overstating a thing. I think the land is cheap at $75.00 an acre, and I do not think that 100.00 would be an extravagant price for it, but I do not know what it has been selling at.

Redirect examination by Mr. O'FLAHERTY:

Our Virginia apples have reputation abroad on account of their quality. The western apples are not the best looking.
75 Where a man gives his orchard the attention they give it out there they are just as red and just as large and a great deal better in quality. As I stated just now to his honor, people are beginning to look for quality in apples. On account of that the Ben Davis apple, that used to be one of our best sellers (a good-looking apple, but poor quality), now you can't get as much per barrel for as other apples, because the public is discriminating, and that is in favor of Virginia. They can not raise the quality of apples we are raising; they haven't got the soil. That difference and the difference of 3,000 miles nearer

the market favors Virginia, and more of our own people are investing in this land every year. It is not confined to investors outside, but our own people are going into it more. I do not recall the names of the Roberson orchard, there are so many in the State. I do not know of the Miller orchard in Rappahannock and the Weaver and Phillips down near Linden.

76 J. L. PHILLIPS, a witness on behalf of the landowners, testified as follows:

I am located at Staunton, Virginia, and working as an orchard expert; for the last two years I have been working in this capacity and for fifteen years prior to that I was acting as State officer, State entomologist, and studying this line of work—orcharding. Have studied the orchard situation all over the State—practically all over the fruit-growing section of the State; studied six years at the Virginia Polytechnic Institute on horticulture, fruit growing, and stock raising, all combined, and had experience since then studying conditions in this State. At Blacksburg was student and officer seventeen years; as an officer, State entomologist. Am acquainted with the community around Front Royal and Warren County. Am acquainted with the Macatee, Jackson, Barbee, and Thompson land. Have not lived in that section, but have been developing an orchard there for eight years and have had special opportunity for studying conditions there. My orchard, I should judge, is about seven miles from there. The soil is similar in many respects. Taking (this land in question) as a whole, it is possibly superior to the tract that I am developing there. Have 600 acres in my tract and about 13,000 trees on the tract. I have been over the land in question. I went over it with my soil auger. I bored into the soil to find out how deep the soil is and the character of the soil and the subsoil, and in that way test it general character for any purpose, as to what purpose it is suited for. On this Macatee track the soil varies from two feet to along about twelve inches. There is hardly any place on the track, even taking the little washed places (of course it would not be quite so deep), but any place outside of any little place where the soil is actually washed off, it would range from two feet deep along to twelve or fourteen inches. Where the soil is washed off it is deposited lower

77 down. The soil on the upper lands there, what we consider mountain soils, are of a very different character from those a little lower down. They are formed of granite rocks. In some sections it is actual volcanic formation, but whether volcanic or not it is the same general character and form of granite rocks, with phosphate and potash, which makes it valuable for agricultural purposes. It is very rich in those elements and much more valuable than soils a little differently located. The feldspars are the rocks largely entering into the soils in that mountain section. They are rich in potash and phosphate. The gneiss enters into them to a great extent, but that is simply a gradation from the feldspar. The term granite or granitic

rocks covers the whole grade. It is, as a rule, soft rock that breaks up readily; that is why the soil is so deep there. This land is ideally suited for the growing of apples and peaches.

In answer to the COURT:

There are some small sections of two of those tracts that are not as valuable; they are lower down and of different formation that enters more into slaty or shaly soil. (Here the court asks witness to take up different tracts and asks them as to Alma Jackson, indicate, north of the road. That is practically the same as the Macatee tract.

By the COURT:

Q. How about the one south of the road?

A. That tract is a little lower and not as valuable as tract number 1. It goes more into the slate-bearing section.

The Barbee tract is very good soil, but a small portion of it on the lower side shades off into a shaly and slaty land. Only a
78 small part of it. I should say as much as twenty-five acres of the eighty-five acres. Twenty-five acres not of the best character of apple land.

By Mr. O'FLAHERTY:

At this point there is a considerable declivity where the slate begins; the land falls very much. From there up toward the mountain there is a gradual raise until you get to Waller's house, so that this area right in here (covering lands in question) from the shale to Mr. Waller's house is in the nature of a little plateau or plain sloping toward the mountain. The character of the land commencing with the shale in going up toward Mr. Waller's house is somewhat of a plateau or rather a valley, more like a valley than a plateau, and then it slopes a little more rapidly up to a plateau above, or the mountain plateau. It is undulating all the way out, but more so at some points than others. Very small parts of the tracts in question are really steep.

In answer to question by COURT:

The Smith-Thompson tract is of the better character of that land, though the soil is not quite so deep; it has been worked possibly a little harder than the other land. He has a small place. Of course, the land down near the stream is different; it has not been cultivated so much and the soil is deeper and is very much stronger just at this time. The land is all well watered, and the drainage is just as good natural drainage as you ever find, except some little spots right near creeks and streams that could be drained very nicely. After coming into this area (indicating) that is 1,000 feet, which is about at the lower edge of the properties under discussion, you are into an elevation that makes it especially desirable for general orchard purposes, and being in a gap there that way it gets the air currents very well also, and fruit located on that elevation is much more lia-
79 ble to escape early spring frosts than the orchards lower down. That is not a theory, but a case of observation for a number of

years. In other words, there is a gap in the mountain and the highest point is about 1,300 feet where the road goes over it, and the top is 700 feet above this land, or not quite so much, certainly it must be 500 feet above the highest point of this land. The turnpike of Rappahannock goes through the gap. The road is just being macadamized at this time and there is an excellent grade from there to Front Royal; in fact, all over the gap.

By the COURT:

Q. The gap through the main Blue Ridge?

A. Yes, sir. Chester Gap I think it is called.

By Mr. O'FLAHERTY:

The only gaps in the mountain here anywhere are Chester Gap, Manassas Gap and the one opposite Luray which is more elevated. This is a much more practicable gap than the others. This gap has cultivated land clear to the top of the mountain, that is, the grazing lands run all the way to the top, the same thing as on the eastern side. The cultivated lands in this gap runs clear across the mountain and the macadam road runs through the center of it, the land being on both sides of the gap and on each side of the road, or rather the Macatee lands are on one side and the other lands are on the other side. The soil is especially suited to peaches. It is granite soil, it is open and por'us and well drained, and good subsoil, and one of the very best soils for the growth of peaches. I just mentioned that the elevation there is especially suited for peaches. Being an early blooming crop, they must be located in a section where late frosts are not common, which is the case at this point, and in general it is well suited to the growth of this crop. As I just stated, being con-
80 nected with other orchards in this immediate vicinity, I know these things from actual observation, not from hearsay. I am acquainted with Albemarle pippin lands in Virginia; where they are situated and the area. The Macatee tract and the Jackson tract, and the first tracts we spoke of, a large portion, practically all the Macatee tract and a large portion of the other tract on the same side of the road would grow excellent pippins. It is a deep rich black soil, we have already mentioned, in which the pippin is at home. It would be difficult to find a tract of pippin land of greater area, more available, than this tract; it would be difficult to find a tract as well located for markets and other general facilities. This land is equal to any of the apple lands in Rappahannock and Albemarle and superior in the fact that it is not so much on a cove, but it is open to the breeze and air currents and less liable to disease of fruit and foliage than it would be in many of the best soils in the State for the growing of the pippin. When I examined it, it was in grass, used for grazing purposes. I found a heavy blue grass sod there. Blue grass is indigenous to that soil. It is a natural blue grass land. If you cut down the timber the blue grass comes up naturally, when the

forest is cleared away. It is as good blue grass land as can be found anywhere in the State.

That land ought to graze a big steer to about three acres, and he ought to put on from three to four hundred pounds of weight in one season, or year, on that land. The value of the land is quite a difficult proposition from a number of view points. You have to take into consideration, of course, largely the local value. You take into consideration the value of the lands with some of equal character, etc., in other parts of the country, it would run up into great values; but just to take it in that immediate section, where they are known and their values are appreciated, the Macatee tract and the
81 tract adjoining that, or nearly adjoining it (the Jackson tract) would certainly be worth $100.00 per acre for orchard purposes. The Jackson No. 2, south of the road, the value is not so great. That would probably range 25% or something like under this value, or possibly not more than 20% under it. The Barbee tract ought to run about $85 or $90. The Thompson tract ought to run up to $100.00. The average age of the trees in my orchard are hard to get at. The oldest are now eight years old, and range on down to spring-planted trees. My orchard is about seven miles east or northeast, a little further out in Manassas Gap, same side of the mountain; it is a little further over on the Piedmont side. It is right up in the same character of soil. It is really higher in the gap than this land. Bought my land about eight years ago. The value of it without any trees on it, as a whole, ought to run along from seventy to seventy-five dollars an acre. There is a good deal of waste land in the tract and some has not been fully developed (speaking of his own tract). The values here (speaking of the land in question) would range, from what I paid for a tract last fall that is really undeveloped, no grass on it practically and covered with brush. I paid $35 an acre and may have paid $36. Other land on the tract is worth $125 per acre. It would range from that between those two points. Taking into consideration the demand for apple lands in Virginia and the natural advancement in the value of that land from the present condition of affairs, I should say the Macatee land, leaving out the speculative value or anything of that kind, is certainly worth $100.00 per acre. If you take into account the speculative value, the increase in values there that would be caused by the special transportation facilities and special conveniences to markets, in a few years' time that value might rise to double what it is at the present time, and in a very short while do it. While
82 an orchard is coming into bearing other crops can be grown to advantage, but afterwards it would not be a point of high class orcharding to attempt to grow other crops. The facilities are excellent there. The macadam road just completed passes this point to Front Royal only a short distance; practically all down-grade from this point to the railroads, and two excellent lines of railroad touching Front Royal, and in close communication with New York and Philadelphia and the other large eastern markets, which makes

transportation facilities excellent; they could not be better in this part of the country. The road seems to be a well constructed macadam road. I should say that the cost would run, say, from $3,000 to $4,000 per mile—certainly that much. Orchard yields are fine. It is hard to understand for one who has not seen the apples taken off the trees. Fine apple trees 15 to 16 or 18 years old will yield from ten to fifteen barrels per tree, and forty trees to the acre would make quite a lot of them. Getting an average of ten barrels to the tree from forty trees, you would have 400 barrels, or 1,200 bushels. I have been in Rappahannock County where they raise Albemarle pippins. It is about 18 or 20 miles from the Charles Wood's estate apple orchard. (After correcting states it is 15 miles.) It is better for apples than the Wood land, a great deal of it. Some of the best orchards in the country are in Rappahannock County; the apples raised in this community same as the Albemarle pippins; they are much better than the apples grown in Washington, Oregon, and the West. There is a large orchard up on the mountain as you go up to Rappahannock; I could not say exactly how many trees or how many acres. I really have not been on that tract, but I know just where it is located. I have observed it a number of times. The Chester Gap orchard is up there, very much higher up than this orchard.

83 Cross-examination in answer to Mr. WEAVER:

I do not know the name of the orchard above the Macatee land, which you call the Brown orchard. I don't know that the land in the immediate vicinity, to which I refer, sold a few months ago for $30 per acre. I did testify before the commissioners. The commissioners had my testimony when they considered the matters. There are a very few peach trees in Chester Gap. I don't think I stated that the Macatee land was in the valley. The Macatee land is on a plateau above the valley. There is a little portion of it climbing from this lower valley up to a plateau that is somewhat steep; the part above that is rolling; I mean undulating; that is my idea of rolling land. The difference between the elevation of the lowest part of the Macatee land and the highest part is something like 300 feet. Don't know the exact distance the Macatee land is from the top of the mountain; something more than a mile. Orchard land referred to earlier in the testimony is situated mostly in Fauquier, not in the Chester Gap. Do not know of any orchard land in the Chester Gap. Purchased my land at various times, last of it in the fall of 1911; paid about $35.00 per acre; one building on the Macatee land, not of very great value. $35.00 is the highest I paid for my land; the least I paid is $20.00 to $25.00 per acre. I am acquainted, in a general way, with the market value of the land in Chester Gap; I am not there very much and don't know much about the special tracts that sell for any special prices. In a general way I am familiar with lands there; don't know of any special tracts for sale for $60.00 an acre.

"Q. Have you ever heard of a tract being sold for $60.00 an acre?

"Mr. O'FLAHERTY. I object to his telling what he heard.

84 "The COURT. I think that the question can be asked by them—do you know of any land selling for that much, or ever heard of any selling for that much?

"Mr. O'FLAHERTY. About the 'heard' part I don't think that is right.

"The COURT. I don't see any objection to their asking what he heard. I think that would be admissible.

"Mr. O'FLAHERTY. We save the point."

"By Mr. WEAVER:

"Q. In the Chester Gap section have you ever heard of any land up there selling at $60.00 an acre?

"A. I don't know of any case.

"Q. Have you ever heard of any being sold for $50.00 an acre prior to the time of the Government taking the land?

"Mr. O'FLAHERTY. We object.

"The COURT. I think on cross-examination they have a right to let the court know what he heard.

"Mr. O'FLAHERTY. We except."

In explanation, the witness stated:

"I have fixed these values from the general value over the State and over that section. I know in many cases what lands are held at and what they ask for them without knowing of any special case where these lands are sold or changed hands at these prices. I have endeavored to fix the price of the land as to its value for these different purposes; but I do not know the market value of these lands. A large portion of my orchard is quite similar to that of the Chester Gap land. It is difficult to get at the highest price for which land is sold, because other lands there in that section of similar character haven't changed hands much; the one we are working on did. Some lands have been sold at public auction there, I understood,

85 but I haven't kept up with that subject; heard of lands selling for about $40 an acre with buildings on them and $35 without buildings on them. The only sale of lands where the soil is practically similar is in large part the land bought myself. I do know of real estate that has changed hands for more than $35 an acre in my section. I recall a specific case, a tract of 400 acres sold for $30,000.00, the Weaver orchard; a number of trees on this orchard were twenty years old; I didn't calculate how much an acre it was."

In answer to questions by the COURT:

It is difficult to get at the number of acres in the Weaver tract unless you make a survey. There is, perhaps, thirty acres of orchard, possibly a little more, possibly less; the balance is farm land or woodland.

In answer to questions by Mr. O'FLAHERTY:

A great deal of it is mountain land and quite steep land.

In answer to questions by Mr. WEAVER:

Don't know accurately how many trees are in the Weaver orchard; it would be largely a guess;.don't know if they are in the neighborhood of 17,000 or 20,000; am an orchard expert; have been in court a number of times; I give testimony as a part of my business when called on in court; I do not consider that I am in a great respect optimistic about the orchard industry; I am very conservative in my estimates; I do not permit my optimism to run away with me, but I have been called on for the purpose of assessing damages where orchards were burned by plaintiffs to suit. My valuation is not generally the highest, and has not been, quite often, the lowest.

86 Redirect examination in answer to questions by Mr. O'FLAHERTY:

I do not know the exact number of acres in the Weaver orchard. I think there must be about thirty acres. There is a large part of it that is precipitous mountain land and not susceptible of cultivation; I should say as much as from 100 to 150 acres of the Weaver tract that would be suitable possibly for orchard purposes. It runs back from what is called Wopping station to the mountain, and the mountain side is included in the tract. John W. Wood, an apple man from Rappahannock brought the Weaver tract.

In answer to questions by Mr. WEAVER:

This tract is on the Southern Railway; joins the right of way of that road.

In answer to questions by Mr. O'FLAHERTY:

I have to haul the apples a mile and a half from the actual point of contact with the railroad; the road is usually very rocky and bumpy, not hilly at all.

87 JOHN B. EARLE, a witness on behalf of the land owners, testified as follows:

I am a farmer residing at Milldale, Warren County, Va.; husband of Mrs. Roberta Macatee Earle, one of the owners of the Macatee tract; I have known this land over twenty years; have rented it and grazed it; this is the third year I have grazed it. Year before last (1910) I grazed, I think, forty-five cattle and eighty colts on there in 1910. In 1911, that was the last year, I had forty-one cattle and I think five horses running on there. If your Honor will allow me, I have a note here where I weighed those cattle when they went on the grass. I put forty-one cattle on there on the 2nd day of May. The forty-one cattle weighed right at the scales (Mr. Waller's scales right at the land) 665 pounds. I sold twenty of these cattle on September 4th, and they averaged 1,130 pounds, a gain of 465 pounds. I sold the next lot of cattle on November 3rd, 1911. They weighed 1,082 pounds, a gain of 417 pounds; got for both lots of cattle 5½ cents per pound; did not feed them during the time of grazing. The land is well watered. I have been to southwest Virginia buying cattle. Every bit of this land is fit for grazing; it is not so hilly that it is difficult for cattle to get around on it; large cattle do well on it be-

cause it is not hilly. From my experience, cattle grazing on very steep land run off a great deal of their weight traveling backwards and forwards if the land is very steep. I consider this land suitable, very suitable for grazing cattle on. At a very low price, I consider this land worth about $75.00 per acre. The Barbee land—I have never been on it, but have seen it. Have been on Mrs. Bob Jackson's land on the right side of the road. I regard the Alma Jackson land worth $75 per acre, not any less.

88 In answer to questions by the COURT:

That is on the left-hand side coming up from Front Royal, northeast side of the road. I put that at $75. Do not know the other Alma Jackson land; have just ridden over it; but I do know the tract on the northeast side very well; have been over it many a time.

In answer to questions by Mr. O'FLAHERTY:

I consider the land on the right-hand side coming from Front Royal good as the left-hand side. It has been grazed hard; Captain Conrad has been grazing it for the Government with horses; I consider horses hard on grazing because they eat the best and leave the worst; do not clean up land like sheep or cattle. The Barbee land runs down in a flat along the creek. I don't agree that the land in the flat is better than the land on the hillside, because the land on the hills sometimes produces more fat than land altogether in a flat; but I consider that land as good in the flat as on the hill as far as I know; I haven't been over it and couldn't judge exactly. I am not an orchard man; live down in the valley near Milldale; but I would think this was good orchard land; have been a farmer all my life; live on my father's old place. Have been grazing land ever since 1890; been renting land ever since '91 or '92; land like this in Chester Gap is not to be found. I consider this the best tract of grass land of any I have ever grazed; and I have also grazed in Rappahannock. After you get off the mountain there is no blue-grass land. The land where we live runs into blue grass, but not like the mountain land does.

89 Cross-examination in answer to questions by Mr. GILLESPIE:

Two hundred and seventeen acres, I think, in the Macatee land; pay rent $300.00 for the first year, $325.00 for the second, $350.00 for the third, and $400.00 for the fourth, and on up. That is the highest. I will guarantee it to rent for more than it is renting for now.

When asked the market value of the land in question and of similar land in the immediate neighborhood, witness answered:

Hasn't any land changed hands in Chester Gap and this immediate neighborhood since the Government came in, except to the Government. I do not know of any land sold in the last four or five years. Nobody owns a life estate in this land; don't think Mr. Macatee owns life estate; don't think he owns any; years ago he failed and gave up the life estate, if I understand it; gave it up to his wife; she is dead. I don't think he has a life estate; I really don't know. Mr. Macatee was the father of the heirs that claimed the land; he gave

an option on Saturday; he have an option on it at $50 an acre, as far as I know; I never saw the option. He did not live on the land at all. He lived in the section of Front Royal, I think, ever since the war. I do not regard the Macatee land as the best tract of land in there; I consider it just as good as the others. I can't say that it is better than the others, don't think *think* so. Do not think any other tract of land there better than the Macatee land. I may have told Captain Conrad that it was the best tract of land there because I was grazing it. I naturally thought it better and still think so when I am interested party in grazing the land. I did not intend to
90 state to Captain Conrad what I did not mean. Yes, sir, I had on that tract of 217 acres 41 cattle one year and 45 another, and about eight colts; part of it I did not graze at all—two or three acres down there; only summer cattle there; get the grain to winter them at home. It is good farming to hold them as they are from fall until spring; young cattle weighing 665 pounds. The land comes down pretty abruptly, but there is some bottom land all up the creek. The bottom is comparatively narrow. Some real bottom land on the Barbee and Mrs. Jackson's land on the right-hand side of the road; don't know how much; I would say three to five acres in Mrs. Jackson's, it might be more than that. I have reference to the whole length of the creek going through. No; it is not all pretty steep land. You can get upon the Jackson land and ride through there on this comparatively level land all up there, just a little descent, and upon the Macatee and it is a level stretch of land of 200 acres. I consider it fine land to graze on. You can not graze steep land as well. I consider when you get on top it is comparatively level land. I would imagine that one-third of the Jackson land is level on the top; I mean it is sort of an incline, but not as level as this floor is. I don't consider the tracts of land I speak of rough and rocky and steep. Most of this land is now used for grazing purposes; small portions of them are ever farmed; were farmed years ago. Perhaps the reason they are not farmed, the soil is steep and will wash off, but it pays better to graze the land. Grazing land is in demand again with stock at the price they are. I have seen crops grown there, but have never raised any there and really don't know.

Redirect examination in answer to Mr. O'FLAHERTY:

Captain Macatee is right old and very deaf. Can't hear
91 anything at all; have to write to him; has not been a successful business man; received his land from his wife, and his daughters fell heir to it upon her death. I consider grazing land as valuable as farming land. The Government wants it to graze horses on, I think. That is what they are grazing. You can graze cattle where you can't graze horses; do not know about that as to the steepness, however. This land is good, fine sod, very fattening; no bushes growing on it. When you have tracts of land to keep clean nothing will keep those bushes down but horses and sheep, and horses won't eat anything but the very best grass.

92 GEORGE W. SETTLE, a witness on behalf of the landowners, testified as follows:

I practice law some and farm some; have been engaged in directing farming business, I suppose, for twenty years; am acquainted with the land of Mrs. Alma Jackson and Miss Lucy Barbee and the Macatee land very well; I have known them since I have known anything; it is right on my road to Front Royal, my nearest railroad point; pass by it frequently. I live twelve miles from Front Royal. The land, I think, is about three miles from Front Royal; that would make it about nine miles. There has been a Macadam road built from my town to Front Royal in the last twelve months. In our section I would take it that there has been an increase in value of land of 50% in my county, I know. I am speaking of my own county. Taking into consideration the uses for which these lands can be used, speaking of the Miss Lucy Barbee tract, as I am very familiar with that. I will put that at the value of $75.00 an acre. The other tract that lies a little further over back of the road I would think about $65.00 an acre.

In answer to the COURT:

The two Jackson tracts and the Macatee tracts.

In answer to Mr. JACKSON:

I mean, in speaking of the tract back over the road, that Charlie Barbee originally owned. It was Cumberland Barbee's land.

(Here was explained that that land was not involved.)

Witness continued:

The Miss Lucy Barbee tract is a more valuable tract than the Jackson tract.

93 In answer to the COURT:

I would put that at $75.00 an acre. I think it would bring it on the market.

In answer to Mr. JACKSON:

I think the two Alma Jackson tracts are worth $75.00 an acre. The one that has an orchard on it is worth as much as Miss Lucy's $75.00 an acre. I think $65.00 would be a fair valuation for the Macatee land. I don't think the Alma Jackson land on the same side of the road as the Macatee land is worth as much as Miss Lucy's (meaning Barbee); think it worth about $65.00 an acre.

Cross-examination in answer to Mr. GILLESPIE:

On the right-hand side of the road from my home going to Front Royal. I think I live about nine miles from this land and traveled the road going through it to Front Royal. Never knew much about the stock grazing on it, except in a general way, as I form an idea how much could be grazed on it, on good blue-grass land. I would not judge it was light blue-grass sod, except in very dry season. It doesn't stand drought as well as some land, but in good season I consider it as good as any land. I think the reason it does not stand drought is not due to it being rocky. I notice all the land on the east

side of the road does not stand drought as well as on the other side. Could not be very rocky, because I have seen some pretty fine corn on that land. Lands on these flats at Front Royal, I believe, burns as fast as up further, and there is no rock up there. I could not tell you what causes it, but some think because it is a limestone section; there is plenty of rock up there, but we have our very
94 best blue-grass sods there. We have blue-grass sod where it is rocky and grow our very best apples. I do not consider that steep for mountain land. There is very little bottom land. The valley is very narrow. The land does not come up so very, very steep on both sides—does not go straight up, but rises gradually. Certainly is a pretty piece of blue-grass land. People would not look upon it as being a rough piece of land. I have just stated there is plenty of *of* rock on it. Has not been cultivated for many years; that is the reason the sod is so good. I expect there are as few spots on that land where there is no grass as any land in that section. It is a red land with sod on it. Our very best land is red. I could not say whether there is any black land or not. Never turned any of that sod up. Subsoil on that land, as a rule, is a red subsoil, the same character of land as we have on our side.

In answer to the COURT:

I am on the other side of the mountain, opposite the land in question.

In answer to Mr. GILLESPIE:

I do not live in Warren County. The rock has kind of a copper color and there is a good deal of copper in it. It doesn't look like limestone rock; does not strike me as limestone; does not look like it. *It* think it is a tough rock. They are using that rock to build roads. Never saw any limestone there.

Redirect examination by Mr. O'FLAHERTY:

Most of the land is on the north side of the road; Macatee land is on the north side of the road. I tried to make myself understood to the Court when I was answering the question. There is a
95 stream running down through this land on the left-hand side of the road, going towards Front Royal, and it slopes from this stream each way, one way going towards the road and then on up gradually, and then the other way going up gradually.

In answer to the COURT:

I am talking about the Jackson tracts. Not much difference in the slope between the Jackson and Macatee lands, though the Macatee lands are steeper near the road. After it gets up towards the top it runs up sort of like that [indicating]. It doesn't run to a peak at all.

96 JOSEPH REID, a witness on behalf of the landowners.

In answer to Mr. JACKSON:

I am a farmer and dealer in live stock for twenty-five years. I am pretty well acquainted with the Alma Jackson, Miss Lucy Barbee, and the Macatee tracts involved in these proceedings. Have known

these lands about thirty or thirty-five years. Taking into consideration all the uses to which the lands can be put, I think that the Lucy Barbee land (I think there is a house on it), about 90 to 100 acres, would be reasonably cheap to a man, taking the location into consideration and the improvement of the pike in front of it, at $85.00 or $90.00 an acre, and the Macatee and Barbee land, has practically no improvement on it, ought to bring close to $75.00 an acre. The Alma Jackson tract on the same side as the Lucy Barbee tract I think ought to bring $75.00 an acre.

In answer to the COURT:

As I understand it, the Macatee and Alma Jackson land lies on the east side of the road. I have put the Alma Jackson land on the same side as the Macatee land at $75.00 an acre; it would bring that.

In answer to Mr. GILLESPIE:

I put that on the other side the same.

Cross-examination in answer to Mr. GILLESPIE:

My name is Joseph Reid. I live nine miles from the land, in another county. I see it quite often. Front Royal is my shipping point. My land is right on either side of the pike. Not related to any of these parties. Do not see it just as a casual observer. I am
97 dealer in live stock and have been on the land; have been over it several times. I think my wife is a distant relative of the Jacksons; do not know what the relationship is, but is not very near. Has been grazed ever since I have known the land; farmed very little. A great deal of it would make good farm land. I do not know why it is not farmed; I suppose because they prefer to leave it in grass. I do not know whether it is because when it is ploughed the soil washes off. Have not seen these sods ploughed. I do not know where they winter their stock. Do not think they winter their cattle on this land. It is steep land; has a good deal of stone on it, but is good grazing land.

In answer to Mr. GILLESPIE:

I do not know that it is remarkably hilly or full of gutters. All the blue grass section of our country is rolling. It has hills and hollows. The hills and hollows are about like the grazing land of our country. I think I know of some land sold at the price I am putting it. Some of the land that the Government bought brought this amount of money. The Thompson tract. Do not know that I know of any other tract. Yes, sir, I reckon there is land there that has brought over half the value I put on the land in that section. Do not mean that along the Shenandoah River. There is some land around Front Royal that has brought more than that at the other end of the valley. Fairly level, not as level as the river bottom. Some land that I know of has been sold for half that money around Front Royal, isn't as level as the river bottom. More desirable in every way than this mountain land for farming purposes. It depends upon what the party wanted it for. A great deal of the land around Front Royal would not bring twice as much as this land. I know a

piece of land selling outside of Front Royal at $75.00 an acre,
98 gravelly bottom. Not as good as this land. For building purposes it would bring more than this land. Do not think it would bring $2.00 to this one's $1.00. Do not know of any land that has been sold in Chester Gap recently. Do not recollect the most I have ever heard land in Chester Gap sold for. Am fairly well acquainted with the market conditions. Do not think there has been any land sold around there. If there has been I did not know it.

In answer to the COURT:

I will tell you, Judge, with the improvements that are now, the new road and all, if that was my property, I would not sell it at the price I put on it, any less than that.

In answer to the court who said that there was a difference between what one would take for land and what it would sell for, witness said:

Well, I am inclined to think the price I put on the land, that the land could be sold for that, under present conditions. With the advancement in the price of land I believe that is the market for the land.

In answer to Mr. GILLESPIE:

I think it would bring equally as much if the Government wasn't in there as if it was; I think it would bring it to-day. I didn't say from $75 to $100; I didn't put $100 on it. I tell the court that I believe that the way conditions are now the advancement in the price of land all over our section of the country, that land would bring the price I put on it, on the market, whether for Government purposes or anything else. I put that value on it as grazing land, fruit land, or for any purpose a man chooses to use it for. People have gone up higher on the mountain to buy land very much rougher and worse and are putting out orchards; that is the Robinson land,
sold by the bulk for $12,000, I think; haven't any idea in
99 the world how many acres; a great deal of it is in the mountain. I don't think I heard it discussed what it sold for by the acre; I don't think I heard any one prior to these proceedings discussing the price of the land which I am talking about. The color of the soil is some red clay, chocolate land,—pretty good soil. I do not know if it is black; I never dug in the soil; it is covered with blue grass sod; I never made any special examination of the soil; don't know for certain.

Redirect examination in answer to Mr. O'FLAHERTY:

I think one acre of the Macatee land is worth four of the Robinson. If I were going to buy I had rather have *have* one acre of that land than four of the Robinson, because the Robinson land is poor land, very poor land. It is right there in a bleak cove of the mountain.

In answer to Mr. GILLESPIE:

I would say these lands are half to three quarters of a mile apart.

In answer to Mr. O'FLAHERTY:

The Robinson land is right on the top of the mountain, practically; the land in questions is on this side lower down. No land has been sold for several generations, except an acre or two.

Recross-examination:

I know Mr. Waller purchased the Gardner land, but he bought it for some member of the family; do not know what he purchased it for. It has been some while ago. If any of the Gardner land ever sold for $12 an acre I never heard of it. I think Dr. Kipps bought a portion of the land, since you recall it, and I think the land
100 was sold back to Mrs. Gardner and at Mrs. Gardner's death it was put up and sold publicly and Mr. Waller bought it. That is all the same piece of land. I didn't recall that when I was asked the question, but I remember that it was sold. If Mr. Downing bought different tracts of land I didn't know it. He owned at one time the Green Place. I don't know what any of this land has been selling for. It is all in Warren County, and I live in a different county, nine or ten miles from it.

Redirect examination in answer to Mr. O'FLAHERTY:

The Downing land was bought fifteen or twenty years ago; it is slate land. The difference between the soil nearer Front Royal and the soil you are speaking of now is that the grazing land soil is much stronger. After you get down in the bottom down the hill it is a gravel bed. I owned part of it once. It would take an awful long while to get a sod there. It would burn up in dry seasons. I think this land in question is among the best grazing lands you have in Warren County.

101 G. W. KINSEY, a witness on behalf of the land owners, testified as follows:

I live in Rappahannock County; my occupation is farming; I know the Macatee, Jackson, Barbee lands very well; have been on the land twice, and have been traveling that road for thirty years. That is a thoroughfare from Front Royal to my home. They have a splendid macadam road. Know where the Macatee land is situated. The land on the right hand side of the road going to Front Royal is easily worth $75 an acre. The Jackson land I would say is equally worth as much. I would separate the prices on the different side of the road. As I understand it, there are two tracts. I would place the Barbee land from the old house up to the school house at $85 an acre, and the land below the house running up toward the top of the hill I would place at $75. I don't know the boundaries there, but it is the land right below the Barbee house.

In answer to the COURT:

I do not know the lines, only in a general way. If you can locate the Barbee house I can make myself plain. The Barbee land I place at $85 runs on up the grade on the right hand side of the road

toward the school house. My understanding is that the Jackson land is below the Barbee house on toward the town of Front Royal. That I am placing at $75. I draw the line between $75 and $85 about the orchard. I put the land on the Front Royal side of the orchard at $75—$10 more for the land up toward the school house.

In answer to Mr. O'FLAHERTY:

The character of the land for grazing is good for blue grass. It compares very favorably, indeed, with the best blue grass land
102 in that section of the State; there is not a great deal of blue grass area in that section of the country. There are streams, plenty of water I should say.

Cross-examination in answer to Mr. GILLESPIE:

I live about sixteen miles from the school house in Rappannock County; am not related in any way to these people; haven't had any special call to know these lands, but as a farmer and grazer myself, naturally in traveling along the road the length of time that I have been, I have had an eye as to good grazing land in my mind. A portion of it you can not see from the road, but I have been across that land. I came across there some years ago fox hunting from the West side of the road. Don't know the line fence but evidently in the boundary, I presume, I was on the Barbee tract. I have been on it twice only in my life, possibly ten years ago. I know where the Gus King land is. A portion of it is more level than the Jackson or Macatee land. Don't know if the King land is half as large again as the Barbee tract. From a grazing standpoint, I would not compare the King land as favorable as the Barbee land. I have never been on the King land, have only seen it from the road. I was over there the other day. The grass is not as good as it was some years ago. Don't know why the soil should not be as good as on the King or Barbee land. I can't say that it is the same character of soil. As you go further toward the top of the mountain the character of the land is not as good as near the top, that is, the Barbee land and the Waller land, it is more slaty; it joins the Jackson land. I put the Jackson and Macatee land at the same price. For grazing purposes these tracts lie equally as well as the King tract; don't know whether the King tract is less steep and rugged than the Jackson land; the King land is rather in a hollow. I notice there are a field or
103 two on the King land which are not very advantageous, the way they were originally cultivated. That is better land to cultivate. The further up you get and not so very far from the road it is high land practically almost as high as the other land I am speaking of. I do not consider it rough for that country; it would be for a great many people. It would be considered steep and rough, but for grazing purposes I don't consider it so; stock could get around it easily. I have not seen any of it cultivated, except the King land, for years. I don't know that I can say what the market value of land is in Chester Gap. I don't know of any tracts

of land that have changed hands in there to my knowledge in that grazing land. My shipping point and depot is Front Royal; sometimes I go to Culpeper; usually to Front Royal to catch the train, unless it is the C. & O., then I go to Culpeper; as a rule Front Royal is my station. These land have been used as a grazing proposition practically since I have know them. I do not think they winter stock on these lands; might possibly use some hay there, but don't know. It is a grazing proposition, practically.

104 JAMES FLETCHER, a witness on behalf of the landowners, testified as follows:

In answer to Mr. JACKSON:

I reside in Rappahannock; am acquainted with the Alma Jackson and the Lucy Barbee lands; I am a farmer, miller, and buy some cattle; have been in the farming business and grazing business for twenty years. Taking into consideration all of the uses to which these lands can be put—grazing, fruit growing, location, etc.—I would think a fair value from $75 to $100; and the Barbee land, I think, is worth a little more than the others; I think that is worth $100. The Allma Jackson land is worth $75 to $100; the Macatee land about the same. I passed this land a few days ago; never went on it; stopped and looked out but did not go on the land. A greal deal of it can be seen from the road. I have been going there all my life, across that road, every since I have been big enough to take notice of anything. My mother lived on that side of the mountain, and I have been passing along there ever since then, forty years; go over it two or three or four times a year.

Cross-examination in answer to Mr. GILLESPIE:

Not related to these parties. No special occasion to make an examination of these lands; just know it from riding along the road—no other way. Some of it you can't see, but the biggest postion of it you can see from the road. Do not know the boundaries. Can't see the back of the Macatee land; never was over there. I have had people point out to me the lands a good many times. People who knew where it was have told me; yes, sir, told me about where the
105 back part was. I was never over there; can't see all of it, but you can see a portion. You can not see as much of the Jackson land as you can of the Barbee land; a little of it you can't see. I have understood that what you can't see is better than some you can see. Do not form my opinion entirely from that, but from what I have seen and what I have heard. I had rather see all of it and fix a price on the whole land. Do not know how much it has been grazed or farmed, nor how much it produces. I know how much ought to be produced from land of similar character. I do not know the market conditions in that section of that county exactly. I know the market conditions of the land in Rappahannock County. I live twenty-six miles from Front Royal. We have some steep land and some not as steep; about the same nature of land—good grazing land, good

orchard land. This is pretty fair sod. I would call it good sod, good to fatten cattle with. Very good blue-grass sod; not as good as Kentucky blue grass; if I thought so I would value it higher. I have seen a good deal of blue-grass land not as good this in Rappahannock. I think this land compares favorably with any land we have in Rappahannock. I base my values on what the land would bring. I think there would be no trouble to sell it for $75 for grazing purposes. I think it would bring $75 to $100 for grazing purposes. I know a great many men make money at such prices as that; it is being sought for. I don't know if you could make three per cent at the price I fix. Men with river-bottom farms can raise corn on the river and cattle on the hills. Lots of people come from my county on the other side of the ridge to get good grazing land. Never figured on what interest you could make, simply valuing by what things should bring. I haven't any idea what it would bring. I don't know if any land in that section of the country has ever brought over half that. I think some land at the Remount station has
106 brought over half that. I don't think I know of any land that has brought the price I put on this land. I think $65 is the highest it brought, but am not positive—or $67. This is just hearsay. This is not the information I had when I fixed the value. Whether I had this information, I do not know. I do not know whether $55 per acre was the highest paid and the people talked about it afterwards.

In answer to Mr. JACKSON:

I have under my individual control about 1,800 or 2,000 acres. The closest of this land to my land is twenty-six miles. (It is admitted that the land the witness owns is not in Warren County but in Rappahannock County.)

107 C. B. SILMAN, a witness on behalf of the land owners, testified as follows:

In answer to Mr. JACKSON:

I live in Warren County three miles from the land of Paul Beatty. I have been in the fruit-growing business about three years; grazing, six or eight years; farmed all my life since a boy. I have known the Paul Beatty land twenty-five or thirty years, and went over the land recently since it has been talked of the Government getting it. Taking into consideration the uses for which it can be used, I consider it worth $50 an acre.

Cross-examination in answer to Mr. GILLESPIE:

It is close to slate land. I am not positive about its being slaty land; it has been neglected and grown up in pines; the pines have been cut down recently, but very little cleared up. There are some stumps and brush on it. It does not differ very much from the land adjoining it, if any; never cultivated; I just tell by the surface; grass growing on it. It does not grow so well on slaty land—blue grass, especially. I know where the land is; can see other than slaty land

from the road; have been over the road. I tell the court I don't know as to the depth of this land near the road. There is a branch that comes down back of a little house standing about forty or fifty yards from the road that possibly divides the slaty land from another soil of land by the appearance of the production, the amount of grass and other vegetation. I can't say positively as to slate growing; I know that grass grows there; sod on a portion of it wherever
shaded by the pines; blue grass; if it is not too much shade
108 pines and blue grass grow in the same place, spreading pines,
not forest pines. Grass will grow around under them to some extent where pines are not thick, and there is where you find blue grass. I am not connected with Mr. Beatty; live in the same neighborhood, about a mile apart; no interest in the place. Mr. Beatty is no more than a neighbor or any other Warren County citizen. I value it at $50 an acre because of its proximity to Front Royal, and situated on the best road in the county, perhaps, and being a small tract. I understand lands are selling at $40 an acre around it. I can't see why the land that sold for $40 an acre is better than this; it is the same formation of land; it is sloping; slopes up to a hill which may be termed a spur of the Blue Ridge Mountains. Both come down to this macadam road, and there is no creek that divides these two lands; can't see that there would be any difference.

In answer to the COURT:

As to whether the $40 land was *of* more value than the Paul Beatty land in his judgment, the witness said:

I consider this land as valuable per acre on account of the small parcel of land. There are a good many bushes on the adjoining land that sold for $40 per acre; thick with bushes. There is no brush on it that I know of, but there is brush on this Beatty tract, because the pines have been recently cut off.

In answer to Mr. GILLESPIE:

Slate Hill adjoins the Beatty tract and the one adjoining it. The Beatty tract may be known as the foot of Slate Hill, but the summit is farther up. Slate Hill is so called on account of the slate along the road. More slate can be seen at the top of the hill than where the Beatty tract is. There has been a road recently opened in there that
does not show any slate, opening right into this place. That I
109 have observed. This land could be used for grazing or fruit
purposes, when the brush is off. I think it could get a very heavy sod on it; that is my opinion. I haven't any knowledge it was slate on there. I have not examined the subsoil only from general observation of the land, and what slate land will produce and what regular mountain land will produce.

In answer to Mr. JACKSON:

I do not know of any land selling around this immediate tract for anything like $15.00 an acre recently.

In answer to Mr. GILLESPIE:

Do not know what the Morrison land sold for right across from that. Do not know that it sold for $20.00 an acre or that it is better land. I am acquainted with the market value of land by reason of the sale of land generally in Warren County. For instance, land in Chester Gap was sold for $50.00 an acre several years back. The King tract. That is my recollection. I do not know what the Government paid for it. Yes, sir; I consider it better land than the Paul Beatty land. There is as good grazing land in Chester Gap as that is. I did not say better. The Waller land, or most of that land, is just as good. Do not know that Mr. Waller offered his land and buildings for $50.00 an acre recently. I heard that he had given option on it, but at what price I do not know. Did not have any understanding. I may have heard somebody say. According to the price of land, I think the King land is worth more money. Decidedly more.

110 FRANK D. WOOD, a witness on behalf of the land owners.

By Mr. O'FLAHERTY:

Am engaged in farming and fruit growing. Am the son of Charles B. Wood, who had orchards near little Washington. Father had about fifty acres in orchard. I pass through the land in Chester Gap and have been over some of it for the past twelve years. Know the Barbee land and the Macatee land and know about where the Jackson land is located, but do not know much about it. I have looked at the Macatee, Barbee, and Thompson lands. I have been in the fruit business since the death of my father. We grow the York, Winesap, and Albemarle pippin principally. I have been practically engaged in that business all my life. We have what we term a grey soil with red subsoil, or sandy loam with red subsoil. Our land on the other side of the mountain is more what you would call a freestone soil, because broomsedge grows on ours more freely and very little on that soil over there. The Macatee land from a grazing and fruit-growing standpoint is worth, I should say, between $75 and $90 an acre; the Barbee land from $80.00 to $95.00, possibly $100.00 per acre. That is a little better than the Macatee land, because the Macatee land is a much larger tract, and some of it not as good as the Barbee land. There are a few knolly places in the Macatee land. I don't remember any galls. There are only these stony places, not many of them. I regard it as a very desirable land for grazing; it is blue grass land. It has about as good blue grass as any of it, except some favorably located spots that you can pick out of a few acres. The land over there (meaning Chester Gap) is not as near apt to be wild land, don't go to brushes and briars as soon as our land; it is easier to keep clean than our land; don't have so much broomsedge.

111 In answer to Mr. O'FLAHERTY:

Prevailing winds are from the west in our section. There is a first-class macadam road along there. They are called macadamized roads, being built by the State or county, rather. When it is completed it will be thirteen miles going from Front Royal to Flint Hill, the same character of road all the way. It extends clear through these lands; I do not know the distance. I think from what few apples are grown around there that this land is just as good, and as a fruit-growing proposition it would be worth $30.00 or $40.00 per acre more than the lands in Rappahannock, from the fact that it is within four miles of the railroad. We have some trees just as high as this. My land runs within four miles of the railroad, and we have to haul twenty miles to the railroad, up the mountain and then down. From this land to Front Royal it is all down the mountain. Father was considered the pioneer apple grower in our county.

In answer to the COURT:

Yes, sir; my land is on the opposite side of the mountain from this land. This land is a little higher on the mountain. We have some trees just as high as this. My land runs back on the Blue Ridge considerable, and I have some higher and some lower than this tract.

In answer to Mr. O'FLAHERTY:

I raise Albemarle pippin and also the Rebel apple.

In answer to the COURT:

I think the rock on this land is different. There are some fruit trees on or near this land. I know it grows good apples, although it has no attention; but the apples are good. It would be better if it had attention. On the same character of land this is I know they grow good apples. In our orchard tract we have sandstone or granite. It is a hard rock. Said to be rich in potash.

112 In answer to Mr. O'FLAHERTY:

The land along the Waller and the Macatee land is worth double, at least, than the land on the top of the mountain, per acre. I would be willing to pay more than double if I was buying a fruit proposition. The Robinson tract is right on top of the mountain and a very rough proposition; a lot of bad land there and bad exposure for fruit.

Cross-examination. In answer to Mr. GILLESPIE:

I live at Washington, Rappahannock County, about twenty miles from Front Royal, something like seventeen miles from this land. I have some land that is very mountainous and some that is comparatively level. I bought some land about eleven years ago; it was all in one tract. I am speaking of the home place. Part of it is mountainous and part of it is level land, but none of it is bottom land; but it is good, level land; some rock on it. I purchased that about ten years ago and paid $50.00 an acre for it. It had a barn on it insured

for $500.00 and a house insured for $1,200.00; about 300 acres of it; no bottom land. Half of it is mountainous land, but there is rock in all of it. Some rock in Chester Gap; have considerable amount on all of mine. I can not recall any sale of any size of our mountain land in my section; there hasn't been but little land changed hands. There was a sale of fifty acres of mountain land. I think Mr. R. M. Harris paid for some mountain farm land somewhere between $40.00 and $50.00 an acre. I know some in my section that can not be bought for $75.00 an acre. There is no blue-grass land in our country to be touched, I don't think, to-day for less than $50.00 an acre. That is my candid opinion. I said some land had sold for $40.00 or
113 $50.00, and I don't think it could be bought for that now; that was seven or eight years ago; none has changed hands in my immediate section since. I am seventeen miles away from this land. I do not know that I can recall any land in my section excepting this farm that I spoke of was sold. I paid $50.00 an acre for what I bought; it had no bottom land; laid fairly well; rolling. I cultivated it. Can not recall that there has been any land sold in my county at all that was simply used for grazing purposes except this farm I spoke of that sold some eight or ten years ago. I can not recall any land ever being sold at all at $50 an acre through Chester Gap.

In answer to question if he knew the market value of the land in Chester Gap, witness said:

I don't know of any purchaser at all would be willing to buy it. But I have not looked upon it. I know that grazing lands are very much in demand; I know that. I pass through this land about ten or twelve times a year. Walked over the Macatee land during the spring. Mr. Waller asked me to go over it with a view to valuing it as a fruit-growing or grazing proposition. I can form an estimate from what I can graze on my land. The subsoil may be different. We have blue grass on the eastern slope of the mountain. I think three acres would fatten cattle at 1,000 pounds unless you had an unusually bad season. With a season like we have had so far it wouldn't be any doubt about it. When I fix a value, it is with the idea of what it would do on an average from one season to another. This 217 acres would fatten a 1,000-pound steer to every three acres; that would be 72 1,000-pound cattle. If I were grazing it and found out it would graze them, I would keep more than forty-one or forty-five small cattle on it. Some timber on this land. Do not know how much. I would prefer some timber if I were going to buy it.
114 If I fixed a price, I would estimate the amount of timber; I thought there was about fifty acres in wood land; may be mistaken. That was my estimate. It takes a third more grass to fatten a 1,000-pound steer than it does a 600-pound steer. I did not examine with an idea of merchantable timber. I thought there was not enough timber in it to be objectionable to anybody that wanted it. It would be no objection if I wanted to purchase it. I would prefer

to have the timber there. I didn't examine the timber closely at all. I am not an expert on timber, and I certainly could not pass on it as an expert. I do not think I was on the place over an hour. Walked about three miles an hour. I was told approximately where the lines were. When I went on there I knew for what purpose this land was being taken and by whom. I was told that. Had that in view when I fixed the price. I considered it worth that if it was put on the market for whatever it would bring for either grazing or orchard purposes. My opinion is that a man would pay a little more for it as an orchard proposition. I took that into consideration. I put the land anywhere from $75.00 to $90.00 an acre. If I was buying the land for orchard purposes, I would be willing to pay $90.00 an acre for my own use. If I could get it in the same section for $30.00, I would not pay $90.00; don't think any man would. If there is any in that country for sale at $30, I would like to look at it. I have not tried to buy any. I understood that the Robinson tract on the top of the mountain sold for $33.00 an acre. It is a mile from this. That is my opinion. I know where most of the orchard is put out on the Robinson land is a mile; some of it over a mile.

Redirect examination by Mr. O'FLAHERTY:

115 The C. B. Wood tract has about 75 acres of timber; the timber land is very mountainous and used for fence purposes; that leaves 225 acres; at least one-half of the balance is untillable on account of steepness and rock. I am twenty miles from Front Royal and about the same distance from Washington as Front Royal is. I bought that eleven years ago; it has increased in my section. I was asked to put a price on my place, and I increased the price $15 an acre after I found out what I would have to pay for land elsewhere. This property is, as I have already stated, worth $30 to $40 an acre more on account of nearness to market. Because 300 barrels of apples is not an unusual yield for an acre and because it costs us $90 to move 300 barrel of apples to the railroad. This land would be worth $100 an acre to me. I would be willing to pay $50 an acre if I could get it over there or anywhere on the other side of the top of the mountain. I think the land along the road has advanced twenty-five per cent or forty per cent in value on account of the new road.

In answer to Mr. GILLESPIE:

The road cost over $4,000 a mile and as an orchard proposition, it has increased it forty per cent. There is a little orchard a little ways off that road. The party has been offered $40,000 for it and refused it.

In answer to Mr. O'FLAHERTY:

I was speaking of what it actually cost to haul apples across the mountain.

In answer to Mr. GILLESPIE:

Three parties own the Chester Gap Orchard. I have a brother that has forty-nine per cent of the stock and a Staunton man and Mr.

Warthen are in it. Do not know what they paid. Never heard. I was not interested in the proposition, in fact; I was not in the State when he bought it. Suppose it sold for something like $15.00 an acre, but it was all in the mountain.

116 In answer to the court:

It is about between three and four miles from the Macatee land up the mountain. You turn what is known as the Front Royal grade and go up a steep grade about two miles and you strike what is known as the Chester Orchard Company. It is practically on top of the mountain. South of the land in question.

In answer to Mr. O'Flaherty:

They spent a lot of money in clearing the land, built a lot of rock walls below the rows of trees. I know it costs anywhere from $30 to $40 an acre to clear mountain land at the cost of labor. There is no necessity for that in the Macatee land. It would be an advantage in some parts of it to do it, to build these rock breaks.

117 A. F. Corran, a witness in behalf of the landowners.

In answer to Mr. Jackson:

I reside in Front Royal about two miles from the Macatee, Barbee, and Jackson land, and am acquainted with them. I am merchandizing, livery business, and farm some. Raised on a farm, own a farm, been farming my own land about twelve or fifteen years. I think either parcel of this land is worth $75 an acre. I think there is very little difference, if any, in the three tracts.

Cross-examination in answer to Mr. Gillespie:

I suppose I go into that county about two or three times a week. Do not average that. I graze cattle and colts on the Jackson land. I have rented it by the month. I paid $1.50 a month for pasturing colts. I grazed about a couple of colts. Just grazed by the month. I think it is estimated about three acres to graze a steer. I think a two-year-old colt would eat as much as a steer. This land is not used for agricultural purposes, just grazing purposes. It is not too steep for farming purposes. Could be farmed very nicely. The reason why it is not farmed is because, I suppose, it pays better in grass and they don't care to plow it up. Some of it pays better in grass than to cultivate it. Depends how the land lies. I have seen some steep land that will wash very little. I have never seen that plowed. Sometimes it would pay better to cultivate it. I think the land there would grow splendid crops. It might be that it is not cultivated because it is steep. I suppose they aim to leave it in sod. I have said each parcel is worth $75.00. I didn't say it would take three acres to fatten a colt, I said to graze a colt. There is difference between
118 putting stock enough on there to graze and putting big cattle on there to fatten. Yes, sir, three acres would fatten most any steer eating that grass.

"Q. It was asked you how much was allowed a colt, and didn't you say three acres was allowed for a steer and a colt would eat about as much as a steer?

"A. I suppose so.

"Q. You meant that, didn't you?

"A. Oh, yes, sir.

"Q. What is your explanation?

"A. I didn't mean it would take three acres to fatten a colt—three acres to keep a colt, say. I don't think it would be that."

A colt would not eat as much as three acres of grass. It is estimated by stockmen that three acres would fatten a big steer. It would depend upon the sod. I don't know that it would have to be extraordinary good sod.

119 J. M. LAKE, a witness on behalf of the land owners.

In answer to Mr. JACKSON:

I live in Warren County, near Front Royal. Have been a farmer all my life. Am supervisor of the county; have been for twelve years. Chairman of the board. Am acquainted with the Macatee, Jackson, and Barbee lands. Been over big part of it. Know the general character of them. A fair market price for these lands, taking into consideration the various uses for agricultural purposes, about $75.00 an acre. The macadam road from Front Royal to Rappahannock was constructed by McKinney & Slocum, under the authority of the State highway commission in conjunction with the board of supervisors, of which I am chairman. It cost between $4,500 and $4,600 per mile. I think there has been a general increase in land in that section of the State. I think this road has added to the land value. That is what we are all trying to get, good roads, and think it will improve our land; that it will make our land bring better prices.

Cross-examination in answer to Mr. GILLESPIE:

Have not bought any land for fifteen years. I am supervisor and was elected by the people.

"Q. How frequently are you a candidate before those people whose land you are fixing the value on?

"Mr. O'FLAHERTY. We object to that.

"The COURT. It is absolutely immaterial. It may have a very small weight.

"Mr. O'FLAHERTY. We object to the question.

"The COURT. Overruled.

120 "Mr. O'FLAHERTY. We except to the ruling of the court."

"By Mr. GILLESPIE. How many times have you been a candidate?"

Objection by Mr. O'Flaherty.

"The COURT. I think I will sustain that objection.

"By the COURT:

"Q. When were you last elected?

"A. Last fall; last November election.

"Q. The Court to Mr. Gillespie: Ask him whether he is expecting to run again next time.

"By Mr. GILLESPIE:

"Q. Are you expecting to run again three years hence?

"A. I don't know.

"Q. Were you a candidate through that section when the question of the value of this land was up among those people?

"A. No, sir; there was no question up at that time."

[NOTE.—The question and answer last above were objected to by counsel for the land owners, which objection the court overruled, and counsel for the land owners excepted.]

"I was a candidate, but did not hear any agitation about the price. I had opposition, but this was not agitated. I did not have a brother living up there. I had a brother that had land up in the Gap. His land all adjoins mine. It does not join this land. Do not think he has any that joins the Jackson or Barbee land either. I expect it is one-half a mile away. The King land, then the Jackson land,
121 and then the land that brother owns. I don't think his land lies better than the Macatee land. May be better for farming. The land on the other side is stronger. Their land may lie better. Some of it is just as steep as the Macatee land and some of it is not. As an average, I cannot hardly say. It may not be quite as rough, but some of it is as rough as the Macatee land. It is 200 acres. I think it sold for $40.00 an acre. Lands have been selling at different prices. Lands were sold, before the Government came there, higher than $40 an acre. Different lands around here; I cannot name them. I don't know any land at Chester Gap that was sold for more than $40.00. Do not recall any being sold at all. Do not know what they paid for the reservoir site. I never heard."

122 J. M. STICKLEY, a witness on behalf of the land owners.

In answer to Mr. JACKSON:

I live in Warren County. Lived there all my life. I am a farmer and have been ever since I have lived there. I am supervisor of Cedarville District for twelve to fifteen years. I am acquainted with the Misses Macatee, Mrs. Jackson, and Miss Lucy Barbee tract. I should think the Macatee lands would be worth somewhere from $80 to $90 an acre, and Miss Lucy Barbee's maybe, perhaps, $75; and Mrs. Jackson's somewhere about $75 or $80.00. I was a member of the board of supervisors when the road was built. Built with the aid of the State and laid out by the State highway commissioner.

Cross-examination in answer to Mr. GILLESPIE:

I said the Macatee land is worth somewhere from $80 to $90 an acre. Has been valuable land ever since I knew it. The land was

not quite as high before the road was put in there as it is now anywhere in our county. I think it would have brought more than $40 an acre very readily before the Government went in there. I have heard of some land selling in there. I heard that Mr. Gardner paid $100 an acre for some, some years ago, adjoining this land in question.

(Witness points out on map where Front Royal is; Macatee, Barbee and Jackson tracts are; and points out the land in question and points right above the Smith Thompson tract on the south side of the road.)

I do not know how many acres were bought. Do not mean the reservoir. I do not know from whom it was bought. It was bought by Samuel D. Gardner at $100 an acre. I do not
123 remember how long ago, many years ago. He has been dead fifteen or twenty years. Mr. Waller now owns it. No house on it. I heard he paid $100 an acre for farm land—or grazing land. I had no right to disbelieve it. I did believe it. Do not know how many acres. Do not know anything is the matter with it, except that is good, naturally good. It is an extra piece of land in a flat in a creek bottom. Bought some time before Mr. Gardner died. Lies in a flat, sloping each way. Do not know of any house being on it, or that it was brought to put a house on it. Do not know who told me; heard it several times. Mr. Waller did not tell me. Do not remember who told me; I only remember it was said that it was sold for $100 an acre. It made an impression on me. It was a big price, good land and a good community there and a fine section. I understood that $80 or $90 was offered for this land some time before the Government went there. I heard it from Mr. Sonner. I believe a dozen times. The question of high price was discussed. I never heard that there was any price offered for any of it except Miss Lucy Barbee's land—Mrs. Jackson's land. Heard that the Jackson land was offered from $80 to $90 from Mr. Sonner. Heard him say that—before the Government went there. I do not remember just who told me. It was two or three years ago. Heard it generally about in Front Royal. Cannot give you the names of the parties. If I had not heard it generally, I might. I am a member of the board of supervisors of the county, and there had been an effort made there to approve a bill that was passed by the legislature to appoint a man to inspect the fruit trees in order to eliminate the San Jose scale, and they were talking about the tracts. Perhaps, it was Mr. Wilber Trout who was anxious about this bill being approved by the board in order to sell land. He spoke of several tracts there and several other tracts that would have brought bigger prices if
124 they had had an inspector of the San Jose scale; and there were a number of persons there who prevailed upon us to appoint that inspector; said that it held back purchasers of fruit land, and while talking about this land we were getting information about it being offered and offers on other laid there. I remember Mr.

Trout coming before the board and making statements of purchasers or who would be purchasers if we had an inspector in order to protect fruit in that section. I never said there was any price offered on any of it except the Jackson land. I did not testify before the commissioners. Nobody here that told me that $100 was offered but I reckon half dozen people told me. I do not know of any in that section that has changed hands lately, cannot think of any that has been sold. I do know of land in the county that has sold for over $60 an acre that was not near the town. The board of supervisors paid $65 an acre for a tract of 60 acres in the other end of the county not as good land as that by a good deal either. For farming purposes. Poor House Farm. It was tillable land. There was a petition gotten up saying that we paid too high a price, but it didn't go anywhere. Petition on account of excessive price. All this land in Chester Gap could be used for farming purposes. It is not too steep, would not wash off as soon as you plow it. It is not plowed because it is more valuable for grazing purposes. I have known some of this land to be farmed years ago, lately it has not been farmed any. It is not a fact that it is too steep to be plowed. It would not be seriously damaged by plowing. It has been farmed and in a good state of cultivation. Mr. Gardner used to farm some, but not very much, of this land. He had a river farm and farmed that and wintered his stock there and grazed his stock on the mountain in the summer. I could not mention the fields that have been farmed. It has all been farmed more or less. They farmed it just as they saw fit to farm it
125 and as they thought they could make the most money off it, I suppose. I know it has been farmed. It has not been farmed so much lately, but after the war it was farmed right smart. Mr. Gardner had two river farms and raised provender to feed his stock on, and grazed them on the mountain. They grazed this land and farmed the river bottom. This was years ago that they did farm right smart. There is more grazing done there now than there used to be. Mr. Earle used to farm exclusively; now he herds his cattle on the mountain. The Macatee land is a different grade of land than the Cedarville district. Our land is not so much for grazing, but better for cultivation. Our land does not run in to blue grass very strong. I would rather have Cedarville land for farming purposes. We have some fine laid. I recently optioned my own land at $60 an acre, which is still outstanding.

126 N. S. WALLER, a witness on behalf of the land owners, testified as follows:

In answer to Mr. O'FLAHERTY:

I reside four miles and a half southeast of Front Royal; lived there some thirty years or more, adjoining the Macatee land. I used to be interested in the farm; grazed it in years past. Have been over it all often—each tract. I think the Macatee land is worth $75 an acre; and Miss Barbee's land, in that it has a dwelling house upon it

and has an orchard, is worth more than Mrs. Jackson's—about $85. I own about 850 acres. There is a fine public road running through the place the whole length of the Macatee and Barbee tracts: in good condition, State road, public highway; a good one. It extends a mile between Mrs. Jackson's and the Macatee's; they adjoin; Barbee on one side and the Macatee's and Jackson's on same side. Road extends mile on right-hand side going east through the Macatee and Jackson tracts, and on the Barbee side I suppose about half a mile. Road runs from Front Royal up to the top of the mountain. The Barbee tract is a little over three miles from Front Royal. The soil is rather unusual; limited amount of that kind of soil anywhere in Virginia; very productive; brings fine grass; very much like, if your Honor knows about it, the Kentucky blue grass.

In answer to the COURT:

Dark-red soil; never noticed the subsoil; I think it is clay; it is very productive for fruit trees.

In answer to Mr. O'FLAHERTY:

I suppose that sod there is fifty to sixty years old; I have known it for thirty, and where the bushes and briars are kept down it
127 makes it better to graze it, if you don't graze it too hard. Such land as that you could not afford to cultivate, because it pays so much better in grass and fruit; that is the reason they don't cultivate it. The town of Front Royal paid $105 an acre for the reservoir land, and the schoolhouse site they paid $100; some similar land, a little more gravelly. It is east of Miss Barbee's. Part of the Jackson tract runs by the schoolhouse on the opposite side of the road going up. It is very fine for fruit. There are fruit trees there that haven't been done anything with, worked, or cultivated in my orchard, adjoining Macatee's; I suppose forty feet high; the foliage is dark as can be, filled with apples of the very finest kind; some Albemarle pippins and every variety you can call for. This compares with the very best blue-grass land in that part of Virginia; that is, in Warren County. The garden spot of the blue-grass country in Warren County. The land gets better from the slope of the hill up until it gets to where I live, up above me; it seems to get different on the other side. On the top of the mountain is different, except one place it is more rocky, not as productive of grass. The farm on the other side, called the Jack Robinson farm, is pretty good. The price has arisen very decidedly since the road was put there, and the general prices in the State have gone up; besides, this being a special locality and the character of it limited in area. Telephone runs right along the Macatee and Barbee tracts on the main road; can get long-distance connection in Front Royal. Nature has thrown open a gap there through which you can pass over into adjoining counties, and it is the only place you can get through, except at Linden. There are what we call plateaus in these gaps, with streams running; forks come together, and it is magnificent land; a great many places we

get two or three tons of grass where we don't graze it. Very fine for meadows; has not been reset since I have had mine there
128 for thirty years, and still it is better than it was thirty years ago; haven't done anything but graze my meadows pretty closely and cut the grass off. I generally take my sheep off sometime about the first of April and in June, except bad years. I cut from two to three tons of hay, and after the hay is cut I turn back on it again. Leave it in sod because it pays much better than working—the expense of cultivation; and another thing, it washes the land. The grass prevents that. The Beatty land is just between what you call mountain rock and the limestone—the formation of limestone in Front Royal. It is not, in my estimation, as strong as the other, but it is nearer town; it is not more than a mile and a half or a mile and three-quarters from town. I think he could sell it for a great deal more than the commissioners allowed—$15 an acre; know of no land in that community that can be bought for $15 an acre.

In answer to the COURT:

I think it might be sold anywhere from $30 to $40 an acre. The Carrie Kuser land is on Slate Hill—neat little home; I think $1,000 would be about right for that; the home is worth more. The house itself is worth $300 or $400. She had some more land and sold it; but I think the nine acres is worth $1,000, including the house.

The Bundy place of three and one-half acres is one of the most desirable little places, in my opinion, around there; all in grass except his garden; I should say it is worth about $800. I think there are about three acres in it. Plenty of water all around it, fine, thrifty, young growing trees, a very decent frame building, and the darky makes a good living. The house, I think, probably worth $500; do not think $500 is just compensation for his home; not in cultivation except his garden; fruit trees all over it and in good condition;
129 water all around it; stream runs around his house into Happy Creek; orchard is in pretty grass; about two miles and a half from town. I am acquainted with the Newton Garrett land; about 6.64 acres; house on it; the commissioners have allowed $750 on it; I think that is about right.

Cross-examination in answer to Mr. GILLESPIE:

The Carrie Kuser house is a little later built than the others, but I think one is about as good as the other. The Carrie Kuser house has more rooms, but I believe I would just as soon have the Brown house. I still say I think the Brown is a better house. I don't think that one is worth twice as much as the other. The rooms don't always make a house better, but that is one of the things that usually makes it more expensive and a better house. You asked which I preferred and I prefer the Bundy house. It has some age, but everything is kept in fine condition; it has less rooms. I don't think you could replace it for $300. My opinion is that the house is in good condition; not a great deal of difference in value; some difference, of

course. Never was in Miss Kuser's house; have been in Bundy's; they were sick there and I went down to see them. Miss Kuser makes a good living as far as I know. She seems to have all she wants and plenty of things around, cows and things; don't know the particulars, only what I can see. I have no right to say that she does not make a living off of the place. She lives there and makes a living. I don't know how to answer the question (is it your opinion that she makes a living off of that little scrap of land?) I don't know anything to the contrary; I have no knowledge to the contrary; she cultivated some land, how much I don't know. The darky
130 lives on his place, has comfortable surroundings; no luxuries. Never heard of him working a great deal anywhere else; sometimes on little jobs; has a garden and orchard. All I know is he lives there; as far as I know is perfectly honest; never heard anything wrong of him; he is respected by the white people. Don't know about his income, but he works out sometimes. Amount I don't know. I think his orchard is not as big as this court room, about twelve or fourteen trees; have never counted them; has three acres there, and I think has all in grass, orchard and garden. Orchard covers most of it. I pass in sight of it every day. Never been there since his wife's death. I am in fifty yards of it every day or so; value $800; land $100. Some difference between houses,—difference in favor of Bundy. The land is better until you get beyond where I live, then it deteriorates; this is a fact. My land joins the Barbee tract on the east. Mine is a better sod, and has better buildings on it, has more orchard. I ought not say that it has been better taken care of. I would not like to state such an egotistical thing as that my land is better cared for; don't think I have a right to say that. Then, I have probably more land than they have. I don't know in proportion that I have more land that lies well for cultivation than they have. Never optioned my land at $50 an acre. Did option it at $55 to Mr. Warthen. Mr. Warthen told me that he had gotten an option on all the places around there but mine and probably one or two others, and made it appear that I could not live there very well and insisted on my giving an option, and under those circumstances, I told him I would give local value. Never indicated that I would take less than $55 an acre. After I gave the option, in December I think, Mr. Warthen and Captain Conrad came out. They insisted on an option. I told them I could and would not give an option for $55.00. They said that the enter-
131 prise would not be brought in there unless we put it at a reduced value; the value I put on my land then was $75. There was no appropriation made, that was made later; and, wishing to bring the enterprise in there at that time (here witness is interrupted). It is not true that I intimated that I would take $35 an acre. The second time they insisted on my giving an option I objected to it. I told them I did not like to my option my land at any price. They said "it is absolutely necessary in order to get this enterprise here for you to do it." Then I said to them "I will put

my land at $75 and no less." Then I said in the presence of Mr. Warthan and Captain Conrad "It will be up to you whether you take my land at $75." He said "Yes." As to saying anything about any different price, or intimating any more than that, I never intimated it. That was the second time. I did not say to Mr. Warthen when the first option was taken that I would really accept $35 per acre. I did not tell him I would take no less than $55 an acre. The buildings on my land are good large buildings, with good outbuildings. They hadn't bought any land in that section when I put the price at $75; no appropriation had then been made. I was aware they couldn't come until an appropriation had been made by Congress. I knew they were not coming in there without any appropriation. I raised it to $75 because I knew the road was talked of and the general value of land had gone up, and especially that kind adapted to growing fine fruit, and it was hard to get such land anywhere. The first option, I think, was a year.

By Mr. GILLESPIE:

You mean it went up from $55 to $75 in a year?

I found out I didn't give my land the right value, and they were increasing in value all the time. I don't say that I think $55
132 was enough at first. I think that was not enough. Spencer Douglas' land sold for $105 per acre where they have the reservoir, three acres for $315. I don't know what Mr. Downing's land sold for just below. I am satisfied he wouldn't sell it for $75.00. I think he bought two acres of that land. I am satisfied he wouldn't sell that for that. When we speak of farming we mean cereals, and we don't farm up there because it is so much more valuable. This land, if it is not sold for grazing, I don't know what it sold for. If Mr. Downing sells his I suppose it will be sold for grazing.

In answer to the COURT:

I do not know of any sales of any considerable body for grazing purposes for a long while. It has been nineteen years since I bought any land. I think I paid $25 an acre for land sold at public auction under the hammer; when I bought it a party stepped right up to me and said "Have the deed made in my name and here is $500." I told you of a sale for $105 an acre. I don't know for what purpose it was bought for. With the exception of that none has been sold.

Cross-examination in answer to Mr. GILLESPIE:

Know the Mactees very well. I married their aunt. Don't know that I could say that I save acted as an advisor. I have answered questions; never sought them. They mention this matter to me, of course. These others parties are my neighbors know them well; in fact, nearly all of them down the line have mentioned it to me. I am the Waller that owns the land that the Government is seeking to get, at least, four and a half acres. I think it was two or three years ago they had the option.

133 In answer to Mr. O'FLAHERTY:

The second one was given in December the year before the appropriation, which was year before last. The other was for a year, so this December will be three years, I think.

In answer to Mr. GILLESPIE:

What happened in the spring of 1910 at my house was about as follows: He said he wanted an option on my place. I said, "Mr. Warthan, I hadn't thought of it even." He said, "Yes; everybody has given options for land in the hollow except you, Smith Thompson, and Charles Barbee." I told him if they are giving $50, you would not expect mine with this dwelling and orchard around it for $50. He said, "We are bound to have this place in order to get the enterprise in here." I said, "You can't have it for less than $55. You can draw up an option to that effect." (Here the motion was made to strike out all testimony that relates to what the Government has paid anybody else, and without waiving objection proceeded to re-examine the witness pending looking for the authority on that subject.)

Redirect examination in answer to Mr. O'FLAHERTY:

I never did tell Mr. Warthen, or anybody else, that I would sell my land for less than $55 per acre. I would not take to-day less than $75, and in giving the second option I asked him not to take it, and remarked I would rather for it to be left alone at $75. At the time of the first option the county had not voted on the question of building the road—not mentioned as far as I remember. When the county voted for bonds it was uncertain as to the location. The board
134 had under consideration the building of the road. I cannot tell exactly when it was definitely settled when this road should be built. They have been one year this June working on it, and it was not very long prior to that that the contract was made. I have about 850 acres of land in one body, all contiguous to the other. A portion of that land, probably 100 acres, is extremely fine. There is a portion of it good land, but it is not cleaned up; good if cleaned up. I calculate that 200 or 250 acres has not been cleaned up. Hard to tell what it will cost to clean it up. In my statement I did not intend to convey the idea that my land compared, all of it, with the Macatee land. I did not presume that my land would be worth more than the Macatee land, for taking that land as it stands, the whole, it is better than mine. A lot of my land is not as good as the Macatee land, but the value of my orchard and house makes it equal. A part of my land is good land, but it is not cleaned up, and is not worth as much as the Macatee land, but is as good when you consider the buildings and the orchard.

In answer to the COURT:

If my land was cleaned up, it would be good grass land. In some places it is rocky, but I don't regard that as much, because the grass will grow in the rocks. It is grazing land. There is more of mine in forest and more not cleaned up than in the Macatee's.

In answer to Mr. GILLESPIE:

I reckon in the 850 acres the larger portion of it is not cleaned up. The Macatee land is very valuable land—timber land. I think he has been offered several times $600 or $800.

In answer to the COURT:

I suppose, as a guess, that about eighteen or twenty acres is in wood, but it is good wood, it is good saw lumber.

135 In answer to Mr. O'FLAHERTY:

The timber has not been cut off.

In answer to COURT:

The timber is what we call the original timber, Judge. I don't suppose that it is the timber that was here when the Indians were here, but we call heavy timber, saw-log timber, original timber, and that had not been sawed over; only a few hickories gotten out, that is not saw lumber. The buildings were mentioned in connection with these parties who wanted to option this land. They raised objection to the buildings. Did not want buildings or orchards, and I considered them valuable and I could not let them go without getting some compensation for the buildings. But the idea was that it made no difference about the buildings; they said, "We want this land for grazing purposes," and they so stated, "and we don't want any buildings; we are not caring for any buildings and we are not caring for orchards." But I see they are caring about them. Everybody that has got orchards are caring about them, and I am glad to see the Government is taking care of the orchards. I think there is about 402 acres and ten or twelve acres more on the right-hand side of the road going to Flint Hill. Of that amount, 150 acres is in timber. It is up on the mountain. It is 300 or 400 feet above meadow land. A gentleman leases that part of the farm, with the exception of these ten or fourteen acres I told you about, the 402 acres, and he has the privilege of putting 100 head of cattle on. One hundred and fifty acres of timber land in that 400. Last year, I think, he put on 92, but his contract allows him 100. He now has 70. I say 70—there was 36 and 43, that is 79. He has 79 cattle there. Cattle vary somewhat and he is a man that deals in large cattle, some, I suppose,

136 weigh 800 pounds and some more, probably as high as 1,000, and some would weigh 600. That is about the average. These cattle will put on from 350 to 400 pounds. Of course it requires good grass and good steer to do that. Yes; the road runs right between it, and a part of it slopes to the mountain top on that side; we aim to clean up the smoothest land as we do clean up.

Recross-examination in answer to Mr. GILLESPIE:

Yes, sir; I optioned my land to Mr. Warthan at $55, including buildings, of course; I told him that the house was valuable, I could not give them my house. When I valued the land as a whole I valued the improvements with it. I thought the land was worth more than

the house, and by reason of the house I asked more. I do not think my land, as a whole, is worth more than the Macatee land. I think as an entirety it is about the same as the Macatee. I bought 402 acres eight or ten years ago at public auction. I paid $25, about that, probably a little less or a little more, maybe a little more. I bought that and a party offered me $500 at the time to put it in his name. I would not sell it because I considered it a bargain; I bought it because it was a bargain and because I wanted it.

137 (Miss) LUCY BARBEE, a witness in behalf of the land owners.

In answer to Mr. JACKSON:

I am one of the defendants whose land is sought to be condemned in these proceedings. I have ninety-six acres. Have been paying taxes on that much. Something less than that in a recent survey; eighty-five is not correct. I have owned the lands a good many years, fifteen or twenty, maybe longer than that. My father left me first ninety-six; then I got, after my mother's death, seventeen and three-fourths acres. It came to me from my father's estate. It was my father's homestead. Mrs. Alma Jackson is my sister. We both derived this land from our father's estate. Used for grazing purposes only. It is a fine blue grass, very well watered. I value it at $100. It has a good dwelling house and orchard, and I value it at $100 an acre.

In answer to the COURT:

I would value my father's place more highly than a mere investor would. I do not know whether I am in position to put a market value on it like a mere indifferent stranger, nor what he would give. I value it at $100 an acre. I think I could get that if the Government did not want it. It is a very pleasant place. I have always lived there and gone there during the summer until the last few years, but it has been abused a good deal recently and gone to rack somewhat. I mean to say that I could get $100 for it if the Government did not want it, as a summer resort, anyway.

In answer to Mr. JACKSON:

I gave Captain Conrad an option on it.

In answer to Mr. GILLESPIE:

I gave him an option at $6,000.

138 Cross-examination in answer to Mr. GILLESPIE:

I did not tell him I had 116 acres. I told him I did not exactly know how many; that I had sold off a tract, but, of course, the record would show what I had been paying taxes on. I had been paying taxes of late years on between 95 and 96, and I told Mr. Conrad that it was my opinion that there were 116, that was before I sold a piece—I had sold before I gave the option—a small piece of my land. I told him I did not know how many acres I had at the time, but he could find out; I couldn't tell positively. He did not figure out in my presence 114 and a fraction acres, at $55 an acre. I knew the taxes would show, and how much I sold to Mr. Thompson, and

I would take $6,000 for what I had. Yes, sir; I gave him an option at $6,000. I do not live on this land. I used to go up in the summer months, but these last two or three years I have not been up, and it has gone back. I live at Front Royal. Within the last two or three years it has been very much abused. The porches are down, the roofs are not off, but very much damage to the house. No one living in about the last two years. A house goes very much to rack without no one living in it and being taken for a stable and grainary. I would not stay there now unless it was fixed up, although I rented it as a dwelling house; it is abused very much. Capt. Conrad came back and wanted me to take less, but I would not do it; I was only sorry I gave him an option for that. Yes; he told me the reason he asked me to take less was that the acreage was shorter. He told how it had been surveyed for and I told him it was a mistake, and I could prove by the clerk's office what land I had. I do not know whether the amount he wanted to take off was for the number of acres that had fallen short. I didn't sell by the acre; I only offered it at $6,000. for the whole thing. Soon after the survey was made I told him it was a mistake; he told me, I think, that I could have it surveyed over.

139 Mrs. ALMA JACKSON, a witness in behalf of the land owners.

In answer to Mr. JACKSON:

I am one of the defendants in these proceedings. I am owner of sixty-five acres and twenty square poles of land in one track and forty-three acres and one hundred poles in the other. I believe it was marked track No. 1 and No. 2 yesterday, didn't they. Sixty-four acres in blue grass land, been used for nothing but grazing purposes. The other tract has been farmed some. My home is just about three miles from there, and we have been using it for grazing and farming some of the land; then there is a meadow on it and an orchard on it and both tracts are well watered.

In answer to the COURT:

No, sir; I do not live there. We find it very valuable, this tract with the orchard on it, and we graze it and rent the other—take in cattle.

In answer to Mr. JACKSON:

I do not just know the size of the orchard. I don't think I know the number of trees. It is a fine orchard; delightful fruit on it.

In answer to the COURT:

I do not know the number of acres. I am a poor guesser at acres. I inherited from my father this old place. It is a very large orchard, but my sister has a portion of it; her land and mine adjoin; she has a part of the orchard. I can't tell you how many acres. It is a right large orchard and well located. It is one of the finest locations for an orchard in this part of the country.

In answer to Mr. JACKSON:

140 The line between me and my sister's runs right through the orchard. I inherited this land from my father. Have never

thought of selling it. It is fine grazing land. I consider the money well invested and growing in value. I never wanted to sell it and never considered an offer for it at all, but I would think certainly $100 would be a fair price for it. Captain Conrad, on behalf of the Government, tried to procure an option on this land, but I declined to give it because I had refused more than that. I had an offer just before that of more. He offered me $50 an acre for two tracts; $50 for each tract, and I never thought of that as a fair price for my land. I didn't take it. I didn't want to sell it. I always hoped to hold that land and give it to the children. It was a beautiful location, and everything there, a comfortable home. I never wanted to sell. It was too beautiful a location, and I always hoped to hold it for my children when I was through with it. It is everything there to make a comfortable home.

Cross-examination in answer to Mr. GILLESPIE:

My land is used for grazing purposes. Sixty-four acres is blue grass; only used for grazing purposes. Then the other lot has a fine orchard on it and there is a meadow on it, and we farm a portion of it and raise crops on it. It is a very valuable orchard and has fine apples on it. For eating, delightful apples to use. Oh, yes, sir; they have been trimmed some and taken care of; not in prime condition. I do not live there. A portion of it was set out just before my father's death, which was about thirty years ago, and I think maybe five or six years after that a large portion of it was set out. I suppose several hundred trees; I would rather you would get that evidence from some one else. I don't want to give any evidence
141 that it is not correct. I really don't know. I know some of the trees have been blown down in the storms. A good many. I couldn't say how many. Some of the land has been cultivated all the time up to this year. There is only forty-six acres in the tract. I do not mean to say I cultivate the whole forty-six acres, a portion of it is in meadow; don't know how much is in grazing land.

142 Miss CARRIE KUSER, a witness in behalf of the land owners.

In answer to Mr. JACKSON:

One of the defendants of these proceedings. I have nine acres and something. When I bought this land it was in large timber, and I have had it all cleaned up and fenced. Have a fine garden on it and I have had a house built on it and outbuildings, houses, sheds, and hen house, and hog pens, and such buildings as that. I have a very nice little house, 32 x 14 feet, have two rooms up and two down and a summer kitchen. I graze the land, raise my cows on there. I have three cows and raise my hogs. I did cultivate it for two years and then planted fifty trees. They were apple trees of different kinds. I planted some peach trees, but they didn't live, didn't do very well. I have a fine garden on there, as good a garden as there is anywhere around. It is just two miles from Front Royal, right on the side of the macadam road. Just two miles from the

Front Royal School and two miles from a country school; you can go to either school, town or country school. I make my home there. I made an effort to buy a small home. I asked several people that had small homes what they would sell me a place for. They asked me $1,200. The commissioners have allowed me $900, and I could not duplicate my place for that amount. I could not get me another place with as good a location as mine and replace my home for it. I could not replace at for $2,000, not with the price they ask me for homes. Of course, the Government has land around me.

Cross-examination in answer to Mr. GILLESPIE:

They were houses and just small lots that I was asked $1,200 for. If I was to go down on the boom, on the other side of Front
143 Royal from me, and I would have to sell my cows, couldn't keep my cows there unless I kept them out on the boom; there would be trouble about that. It don't look right for me to sell my home for $900 and go somewhere and pay $1,200 for just a house and lot or no house or anything.

144 R. H. JACKSON, a witness in behalf of the land owners.

In answer to Mr. JACKSON:

I deal in cattle to some extent. Graze cattle. Have been in this business about twenty years, probably more. I am husband of Alma Jackson; am acquainted with the lands in question. Known them for thirty years. They are excellent grazing lands and they are used for grazing purposes, some farming, very little. They could be used for orchard purposes or farming either. I consider $75 a very low price for these lands taking them as a whole. Seventy-five dollars would be a very light price. Not a very great difference in the three parcels of land (Macatee, Jackson, and Barbee).

Cross-examination in answer to Mr. GILLESPIE:

I have known these lands for thirty years or more. I owned a piece of land adjoining these [points it out]. It is as good as the Macatee and Jackson land, fully as good. Conveyed the lands when the option was taken.

"Q. What did you get for that land?

[NOTE.—Question objected to by counsel for the land owners and the objection argued by counsel.]

The COURT. I will hear this evidence under reservation; that is, I will sustain your objection if the authorities seem to sustain it.

A. I optioned my land at $60 an acre. I will tell you why I reduced it to $55.00. I afterwards reduced it to $55 because I was told by a friend of mine, Mr. Richardson, that in summing up the number of acres of land the Government wanted and the prices that
145 was put upon them by the people that they had options from, it was about $15,000 too much; they couldn't pay it; and that he and Mr. Downing had knocked off $10 an acre on their land. I said, "What did you put it in at?" He said, "Fifty dollars." I

said, "You can very well afford to knock off ten dollars an acre," talking along that way. I finally said, "I don't way to be in the way of the Remount Station; I will take off five dollars just in order to have the Remount Station; I don't want to be in the way of it."

Redirect examination.

In answer to Mr. JACKSON:

In summing up the acreage, it refers to the money appropriated by the Government, and the amount of options amounted to about $15,000 more than the appropriation, and in order to induce the remount station to come there I cut the price of the option on my land. I could not tell you how long since I gave the first option. I suppose within the last two years. It was before the road was built. Building the road has enhanced the value of this property materially.

In answer to the COURT:

I think the road was talked about when I gave my original option. I don't think it was a certainty, am not positive about that. It had been talked about.

In answer to Mr. JACKSON:

Oh, yes, sir; there has been an appreciable increase since I gave an option. Even at that time there was no land for sale, practically none for sale—good land like ours. I would not take anything like that for it to-day; they caught me just at the right time.

146 Recross-examination in answer to Mr. GILLESPIE:

I rather think I renewed my option, since you mentioned it, and, as I told you, I agreed to reduce the price. I do not think the road was a certainty at that time. Am satisfied that it was not last summer I reduced the price. Could not tell you whether it was actually under construction last spring, not early in the spring, about June. I don't know about the time. The election was in the fall. Could not tell you how long election was before began building the road. Of course, the Government has caused some scarcity of grass land, but the road has been a very great advantage in the raise of the price. The rise of the price is due to some extent to the fact that the Government began to buy land; that is, not the whole of it. I attribute some to the road and the general advance in land. It has been advancing for the last fifteen years. Nothing unusual in that section in the last year or two. No one wanted to sell their land that I know of.

147 SMITH THOMPSON, a witness on behalf of the land owners, testified as follows:

In answer to Mr. O'FLAHERTY:

I live at what we call Chester Gap, Warren County, and am interested in both of these little tracts. There is nineteen and a fraction on one side of the road and a house and three acres in the piece on the other side. I am willing to accept the commissioners' report as to

both pieces, but not separately. If they take a piece of the land they cut me off with the house and lot, and the lot is set in fruit, and with just three acres I would not have pasture or anything left at all and no place to work on at all but the three acres. The land on which there is no house is worth $100 an acre to me, wouldn't like for it to go under any circumstances, and I still say that. I was offered $100 an acre for it last fall.

In answer to the COURT:

The nineteen-acre piece is the one that Mrs. Thompson, my wife, is interested in; that is, the nineteen acres.

In answer to Mr. O'FLAHERTY:

I can sell it for $100 if the Government will let me alone. I don't think I would have any trouble. I am valuing the nineteen acres at $100 per acre. It is a good piece of land. I have the stone off it and it is in a good state of cultivation—that is, twelve acres of it; the balance is creek bottom.

In answer to the COURT:

My wife owns the nineteen and she is half owner in the house and lot, and will own it all when her mother dies. Mrs. Pomeroy is her mother. I know the Beatty tract of thirty acres of land in question. Attempted to buy it from the owners about fifteen years ago.

148 In answer to the COURT:

I offered to buy the Paul Beatty land fifteen years ago before I bought the piece from Miss Lucy Barbee; I offered $20 per acre for it, and she refused to take it. I haven't been over the land to make an examination. About a mile and three-quarters from Front Royal; faces the State highway; a good strip of it faces the road; the highway runs through it. I should think it ought to bring some $30 an acre.

(This statement was made after the court told the witness to suppose the Government was not there at all, without reference to the Government buying the land.)

My wife's house and lot was appraised at $3,000 by the commissioners and the piece of land at $60 an acre, making $4,160 for the two pieces.

Mr. GILLESPIE. The commissioners put it at $62.50 an acre.

WITNESS. Then I was just mistaken.

In answer to Mr. O'FLAHERTY:

I know the William Brown property; was never on it to inspect it. Don't think I can give an opinion as to its value.

Cross-examination in answer to Mr. GILLESPIE:

Paul Beatty's land is about a quarter of a mile from Slate Hill; it runs down to the foot of what is called Slate Hill. I think Slate Hill starts right about that land. It is not on the hill. Covered up with pines of inferior growth. Don't think it has much slate

on it. It has a hard blue stone. Don't think that blue stone is slate; something harder than slate; Slate Hill is above that; I
149 didn't say it was below it. I said what you call Slate Hill property is above that. The top of it is above it. I don't know about the bottom being low, how far it runs down the hill. I know it is not on the top of the Slate Hill.

In answer to the court the witness says:

"I consider Slate Hill setting in about the top of this Beatty land and going on over the other side of the hill. This Beatty land going on over the road is what I call Slate Hill. I can't say we recognize the Beatty land as Slate Hill. I haven't been there to make a test; haven't been on the place for several years. There was some blue grass when I was there; could not tell you how much. It was enough to make me offer $20 an acre for it. I was then living at the same place I am now. I offered it to Mrs. Brown; don't know where she is now.

In answer to the COURT:

Yes, sir; I offered to buy from Mrs. Brown, who was the owner of it at that time.

In answer to Mr. GILLESPIE:

It was considered it was forty acres. I offered to buy it by the acre and not in bulk. Mrs. Brown was then living at a place called Harmony Hallow. I was going to pay her in money. Got the money where a man always gets money. Have no land outside of what my wife has. Don't know whether the money with which I was going to pay was in my wife's name or whether I had it all that time or not; in fact, I didn't. I didn't have much at that time. She didn't want to take the price. I expect she could have gotten it if she wanted it. I could have gotten money from somebody else, perhaps. I didn't ask her. Don't know if she and everybody else knew that I didn't have anything.

In answer to Mr. JACKSON:

I was in a position to pay for the land at the time I made the offer; could have paid for it.

150 L. B. MOORE, a witness on behalf of the land owners, testified as follows:

In answer to Mr. JACKSON:

I live in Warren County, a mile or a little over from the land in question. Know the land. Know the Paul Beatty land. Taking into consideration the fact that the land is situated within, I suppose, two miles from Front Royal, the market value, at present, I consider it from $35 to $40 an acre.

In answer to the COURT:

I am taking into consideration the fact that the Government is in there at the present time. I consider it more than it would be if the Government had not bought there in that section. If the Government had not come there the land would have brought from $30 to $35.

In answer to Mr. JACKSON:

I am acquainted with the Carrie Kuser property. That is on the other side of the road. I suppose twelve to fifteen hundred dollars is a fair valuation for it.

Cross-examination in answer to Mr. GILLESPIE:

Could not tell you how many acres in the Carrie Kuser tract; suppose nine or ten. Some land jumped up when the Government went in there; and some didn't. It jumped up the Paul Beatty land. It is a small tract and would be more desirable and more valuable; well watered. Would be more valuable in the event of selling to the Government or selling to some one else on account of the Government owning the land on the far side of it. The Government owns land,
you might say, only on the far side, and the Government would
151 necessarily want to get out to the public highway. I
suppose it is worth more because of the Government being there. It is two miles from Front Royal, and the location gives it value. I can't say its peculiar location gives it its value. It is fair value for land within that district of town. No, sir; the Government being on one side of it and the Government on the other side of it does not give it the value. The Government is back of it.

Of course, the land being on the road accessible to the market, and one of the best roads in the county of Warren, it makes the land more valuable than if it was set back half a mile on the ridge. If it was situated ten miles from that road, and ten miles from Front Royal, and ten miles from the Government land, it would not be worth as much. It is west of Slate Hill. Yes, sir; it is on the side of Slate Hill. The land has been grown up in old field pines. No limestone in that country. There may be slate on the upper part of it, I suppose; I don't know. Some blue grass; don't know how much. There is certainly some there.

I had occasion to go there a couple of months age. Saw blue grass on it; how much, I do not know, could not exactly say. I furnished the telephone company some poles and wanted to see if they went through that tract. There was blue grass there. It is not a very poor piece of land. There is poorer land on the top of the ridge, on the spur of Slate Hill, and not a part of the inferior quality of slate land. Yes, sir; I do say that it is not inferior quality of land. The Macatee land is a mile and a half past that. It is not as good soil as the Macatee land; not as good as the Jackson land, nor the Barbee. Do not think the land, as a whole, as good as the Carrie Kuser land. The Carrie Kuser land runs up to the top of Slate Hill. Not as good
as the Carrie Kuser land. Slate Hill is called Slate Hill be-
152 cause there is a little slate in the road and a spring on the top
of the hill, and was so called as far back as I can recollect—forty years ago or more. Always called Slate Hill two miles to Front Royal. Some slate crops out in the county road. Two hundred yards, I suppose, below that you don't see any slate at all, because the creek comes down and there is an entirely different soil. Don't know

whether it is better or worse. You may see a little in the Richardson place. I wouldn't really suppose that fifty or seventy-five yards wide is what we call Slate Hill.

In answer to the COURT:

I would regard it as a good piece of land for farming, and an exceptionally good piece of land for orchard and dairy purposes. Close to the market of Front Royal. I would consider it a very good investment at $35 or $40 and acre; if I was able I would do it. Regard it a good investiment for orchard or dairy farm or truck purposes.

In answer to Mr. GILLESPIE:

If I couldn't do any better, I would raise onions. Of course the land has to be built up. It is not considered a rough land like the Blue Ridge Mountains. Could graze cows on it. Don't know how many. All the land in that country naturally goes into blue grass. Don't consider it quite as good as the other land. Has not had the same attention; would be equal if it had the same attention for the last ten years. Good as the Downing and Richardson land if it had the same attention. See very little difference in the soil.

153 T. V. LEACH, another witness on behalf of the land owners, testified as follows:

In answer to Mr. JACKSON:

Live at Front Royal; resided in the county sixty-five years; not all that time in town. Forty years in the county east of the town; part of the time farmer; have been deputy sheriff, commissioner of revenue, and clerk of the circuit court. Am now superintendent of schools. Am acquainted with the Paul Beatty land. Exclusive of the fact that the Government is concerned there I think that land will bring $30 an acre. Know the Carrie Kuser land. I have placed an estimate on it of $1,200. The William Brown tract is worth form $650 to $700.

Cross-examination in answer to Mr. GILLESPIE:

Paul Beatty land is a poor piece of land. Base the value upon its location. If it was not thin it would bring $60 or $75; if it was as rich as land in that country it would bring $50 or $75 an acre on account of its location. The land has been practically lying out in the commons for a good many years, neglected. It is just as good, almost as good as the land adjoining it, the Downing and Richardson. Yes, sir; it adjoins the Slate Hill tract of Richardson and Downing.

In answer to Mr. O'FLAHERTY:

Downing and Richardson own the Slate Hill tract.

In answer to Mr. GILLESPIE:

Not as good a tract of land, as a whole, as the Downing and Richardson. I think it can be made as good as a third or half of that tract. Don't know what the Downing and Richardson tract
154 brought. I think the Government offered them more than $40

for it. This land (the Paul Beatty land) in its present condition is not worth half as much, not a third as much as the other land in Happy Creek. Its condition is certainly exceedingly bad. Land not any better than that a little bit nearer Front Royal has sold for $75 in the last two years. Its proximity to Front Royal and abutting on the macadam road adds to its value, and the fact that it is a small piece of land close to Front Royal. Not a valuable piece of land in its present condition for farming or grazing. I believe it would be a good investment at $25 per acre, might be at $30 an acre; and inside of five years make it bring $50 or $60, maybe more. I don't think the Government has added anything to its value. Has not increased in value in my estimation. I knew of land in that section selling for that price. Not in that immediate neighborhood. Knew of land in the county selling for $117 an acre; not near that tract. Land adjoining this tract (Slate Hill tract) sold for $50 an acre to C. W. Morrison, on the north side of the ridge, just over the ridge; same character of land. Don't know the number of acres exactly, 113 or 115 acres. Had a fairly good house on it. That is all it did have; small house; no other buildings, not so sure of this; house was practically new. I believe it did have a silo and a very ordinary barn on it. Don't know about dairy house. I think a good deal of that land is as thin as the Paul Beatty land. No, sir; just a mile from Front Royal; not quite $50 an acre; brought over $40; think I am sure of that; not sure just what it brought. My recollection is that it was something like $50 an acre. Total consideration, I think, was $5,000. Don't know the number of acres. There was some dispute about the acreage, but I think it was surveyed two or three times; I think, though, 113 or 115 acres. I don't think that any other land was sold except what the Government bought. Mr. Waller bought some ten or twelve years ago; paid $26, I think, an acre. Dr. Kipp bought some; about half of it was in the mountains, about 200 acres of this tract was cleared; same kind of land; don't know what Dr. Kipp paid for it.

155 PAUL BEATTY, a witness on behalf of the land owners, testified as follows:

In answer to Mr. JACKSON:

I am the owner of a tract of land embraced in these proceedings. I bought it for forty acres. It has been surveyed since for thirty acres and a fraction; owned it since the 5th of April, 1911. I paid $1,600 upon the hypothesis that there was forty acres. I consider the fair market value, taking into consideration its location with reference to the market and roads, and exclusive of any benefits that the Government may have produced by reason of establishing the remount station in that vicinity, at $60 an acre.

In answer to the COURT:

I mean to say if the Government was not in there at all I could sell it for $60 an acre; if the Government never had offered that. If the

Government never had come in there and never wanted to come in there I don't know that I could sell it for $60 an acre. I don't doubt I could get $40 or $50 an acre, taking into consideration the size of the place and the distance from Front Royal.

In answer to Mr. JACKSON:

I was offered—(interrupted).

In answer to the COURT:

By Captain Conrad.

In answer to Mr. GILLESPIE:

That was in the first of April, somewhere from the 5th to the 10th last April.

Mr. GILLESPIE. We think this is objectionable.

The COURT. Captain Conrad is right here; he can state all the facts and circumstances. I think that is proper.

156 WITNESS. He offered me $1,000 at one time and later Mr. Warthen offered me $1,200 for the tract of land, considering it forty acres of land.

By the COURT:

Q. Supposing it to be forty acres of land?

A. Yes, sir.

Cross-examination, in answer to Mr. GILLESPIE:

I paid $1,600 for it; paid part in money; don't know how much in money. Paid part in money and part in meat and bread and part in one thing, for support, and got $100 a year for it.

In answer to Mr. JACKSON:

I purchased this land from Mrs. Henrietta Brown.

In answer to Mr. GILLESPIE:

I paid $1,600 for it.

In answer to the COURT:

The vendor was distant relative of mine, third cousin, I believe. I got $100 a year for what I furnished her. She owned this land and conveyed it to me. I was to furnish her a living. Starting at the first of it, it was willed to my father and drifted along until it fell upon me to furnish the stuff. He furnished it for awhile and she got to liking me right well and she called on me for things and I thought possibly in a settlement after a while I would want something to show for it, and I asked her for her notes and she gave me her notes from time to time for what I did. The notes that I got amounted to $1,050 and my father gave me [illegible] had (he

157 has had an account with her), making $[illegible],000. She had two little tracts of land. That was twenty-two acres in the other tract. I wanted these notes so that I could settle with whoever I might have to settle with in future years, but it turned out that I settled with her, and I got the deed in her life time.

In answer to Mr. JACKSON:

She is now dead.

I agreed with her as to the price in 1911.

By Mr. GILLESPIE:

"Now, isn't it a fact that this old woman was living there and owned this property, and that is all she owned; that you and your father provided for her until she died, and she left you this land, and that you figure that it cost you about $1,600—$1,900 for it all?"

I knew that it cost me that. No; I did not have any other original agreement with her in the beginning. Oh, yes; I had an agreement before she died. I was taking her notes, and the notes had gone to $1,050, and father had an interest in it which he gave me, and that was the way that it was settled up. I took what she had. I got her land—all the land that she had. She had some little furniture; but I will tell you right now that I don't want another job like that at $1,600. Yes; I tried to get a deed after the Government came over from this woman. I did not put the consideration at $1,600 and offer to sell it to the Government at $1,400. I did not offer to sell it to them for $1,400, but for $1,600, taking into consideration it was forty acres. I did not offer in Mr. Warthan's house in the presence of Capt. Conrad to sell him that property at $1,200 nor at $1,400, nor did my father acting for me in my presence offer it. She
158 didn't make a will and leave this land to my father. She made a will fourteen years before that, leaving it to my father. We were not living on it. She was having what little benefit she got from it. There was very little benefit the way she handled it. The first my father was attending to it and to the last I was. We attended to it and furnished her with provisions, clothing, and some money.

In answer to Mr. JACKSON:

Me and my father furnished supplies and support to this old lady for nineteen years and some months.

159 I. L. BEATTY, a witness in behalf of the landowners.

In answer to Mr. JACKSON:

I am father of Paul Beatty, one of the defendants. I live near Acro, Warren County. Lived there over forty years. I am justice of the peace. Been justice of the peace seventeen years ago yesterday. I usually sit in trying cases at Front Royal. Am acquainted with this land. Might say have known it sixty years. My son obtained it from Mrs. Henrietta Brown by purchase. Mrs. Brown had been a widow for a number of years, and got her living from us. She had gotten $1,050 from Paul—he had her notes for it—and she had gotten about $1,900 from both of us. That was the consideration. She called it $1,900. I couldn't swear it was exactly $1,900. Purchase price was $1,600. He paid $1,600 for it. Well, I thought he could

get a good bargain in it at $1,600 and think it yet. The surveyor who surveyed it for the Government only made it thirty acres and a fraction. Yes, sir; my son got another piece of land from Mrs. Brown. I think it was twenty-two and a fraction, back up in the mountains. Yes, sir; further up in the mountains, between three and four miles from this piece.

By Mr. JACKSON:

Captain Conrad first offered for this land $1,000, and Mr. Warthen said he could get Captain Conrad to add $200 more to it—the $200 that he had saved on another purchase.

Cross-examination in answer to Mr. GILLESPIE:

I did not offer to take anything—no price—at Mr. Warthan's house after Captain Conrad had gone out to the stable. Mr. Warthan said, "I can get him to add $200 more to that offer that he has
160 saved on the purchase of another tract." I said, "Can't you get him to add another $200?" He said, "I don't think I can." My intention was, if he had said that he thought he could, then to tell him to "get him to add another yet, and you will be together," but he said he didn't think he could, and it was not necessary for me to say anything further. The twenty-two acres of land lay up in the mountain, in Harmony Hollow—not exactly in Harmony Hollow, but on the slope of the mountain running down through Harmony Hollow. It is common mountain land. He don't own Slate Hill. That belongs to Downing and Richardson. I don't know what you call Slate Hill; we generally call it the top of the hill. Slate Hill lands run probably three or four hundred feet from the top. I never heard it (this land) called Slate Hill there. There is one place in the road at the top of the hill called Slate Hill. It is not what I have always considered Slate Hill. Not on the top of the hill. The twenty-two acres spoken of is not cultivated; it is grown-up land; nor is this thirty acres cultivated; it grew up, too. Both of them pretty good soil. There is parts of the mountain soil that I expect the soil is richer; other parts it is not. Better in places. As a whole I do not think it is. The lower place, in my judgment, is better as a whole. A part of the mountain land is more fertile than this Slate Hill's tract. How much I am not able to say. I did not say he sold twenty-two acres up in Harmony Hollow. He has still got it. I regard it worth more than $300. When I took this deed I did not set the price; $300 is what he bought it for. Got them in separate deeds. He got the lower one first, I think. She had willed me the land some years before that. We have been providing for her. I did not ask her for the deed when the Government came in. Nineteen hundred dollars is what she priced the two properties at. She was, I think, some eighty-one years old. She had been paralyzed at one time. She signed the deed and acknowledged it; wrote it at the price agreed upon. I took her acknowledgment. The deed was to my son.

161 J. M. STICKLEY, a witness in behalf of the land owners, resuming the stand for the purpose of correcting his testimony heretofore given.

WITNESS. The statement I wish to correct is in regard to the $100 an acre that was offered by Mr. Sonner. I think I started out with $75, and, impressed with the thought of saving $100 on the other, that I said $100 that was offered when Mr. Sonner offered $75.

In answer to Mr. JACKSON:

For part of that Jackson land.

In answer to Mr. GILLESPIE:

Q. Just one part?

A. I think so.

In answer to the COURT:

The part separated by the road. Right hand by the road going from Front Royal.

In answer to Mr. WEAVER:

I thought it included all; I am not certain. I do not know about that.

In answer to the COURT:

No house on that part of it. The old homestead was on that side, but it does not belong to that tract.

162 A. W. DEARING, a witness in behalf of the land owners.

In answer to Mr. O'FLAHERTY:

I live in Virginia, Rappahannock County, near Flint Hill. I haven't been married yet. I am eighty-three years old going on eighty-four. I was born and raised in the same house I am living in now—been in the Dearing family ever since 1805. Live near Flint Hill, about thirteen miles from Front Royal. My home is pretty near as near Front Royal as the village of Flint Hill. I own between two and three thousand acres in Virginia and I have sixty-five hundred in Tennessee. Sixty-five hundred in Tennessee is what I have a deed for. I have bought nearly all I have, and sold in Virginia seventeen hundred acres a year or two ago. I have known this land ever since I was big enough to go that far from home, and knew the people who owned it very well indeed; they were my friends—a good deal older people. I have known it since I was grown. When I first knew both tracts Captain Sam Gardner owned what is the Waller land now and Madison Barbee owned the Barbee tract. The Macatee lond belonged to Captain Gardner. I think it is about 1,000 acres in Mr. Waller's now and about 200 and odd in the Macatee. I go over there frequently; sometimes two or three times a week, not often. The nearest train is Marshal, about twenty-five miles or thirty miles below Front Royal. I have shipped cattle from Front Royal right off this Gardner land I am talking about probably fifteen years ago. I have ridden over it and thought about the quality of it. This land is fine for grass; it has fine sod on it, and it has been naturally protected, because it is rocky and the sods

haven't been disturbed, and if they were plowed up it would take five or ten years to get back the same sod. I am judging from what I have done myself. I have always made more money out of my
163 cattle without plowing than plowing, always. Land more valuable for grazing, even if the rock was off; that has been my experience. I have just stated that with my own lands the money that I have made I have made from grazing. If I had the management of any of it, I would keep it in grass, because I think it would be more profitable that way than any other. I don't think I would make any profit from it by plowing it. But there is more than just the soil. The water is fine there. I know; I have shipped cattle from there, and I know that country makes good cattle. They have made a good road on that side. It is not quite completed to our village by four miles, I reckon, but it is completed through this land in question to the top of the Blue Ridge from the town of Front Royal. Ordinary grazing land in our country requires about four acres to a steer. Good land will graze a steer on from two and one half to three acres. I wouldn't suppose it would take certainly over three acres of that land in question to graze good heavy cattle and make him fat. Sixty dollars would be very well if the owners agreed to it. I would estimate it higher in value. I estimate the value of the land about $75.

In answer to the COURT:

(Q.) What value do you put on the Barbee land?

(A.) I think $75 would be a fair compensation. I do not know what it would sell for. You ask me what I would give for it. I have told you I didn't desire to have any, and I wouldn't buy land at its full value, because I have more land than I can manage, so I am not as much interested as I was when I was able to manage it. I am not in the market to buy land; I have sold land because I could not manage it. I was trying to tell you I would price the land at $75. I think the land is pretty much the same quality of land—the Macatee land, the Barbee, and Jackson land. The Jackson and Barbee land I regard as the same tract; it has been split up.

164 Cross-exmination in answer to Mr. GILLESPIE:

I do not recollect saying any such thing as I regarded $30 an acre a good price for any of that land to Mr. R. L. Leach in riding down by it. I do not think I stated that I thought the price the commissioners put on it was high. I do not recollect any conversation of that kind. It might have occurred, but I don't recollect it. I am not in favor of condemnation proceedings, except as a necessity. I have had some land condemned when I didn't think it was any necessity, and they didn't give me what I thought was the value of it, and I have sold land for double that right against it since it was condemned for a school house. That is the only experience I have had in having land condemned, except for road purposes. No; I did not like it much when they took my land, and they did not give me what I thought it was worth. I don't think the judge did me justice even, because he had some two parties there; one placed it at $250 and

the other at $100, and he didn't divide it up, and I didn't think that was just right. I think it would have been sort of fair to have struck a balance. I have been selling some land a little further from the village for double that. Of course I am not condemning him, but I am just giving what I felt at that time and since, too.

165 JOHN M. JOHNSON, a witness in behalf of the land owners.

In answer to Mr. JACKSON:

I reside near Front Royal. I am a farmer, have been for twenty years. I know these lands in question. It is some of the best grazing land in the country. Really, I would consider it the best grazing land. It is nearest the county seat, near a good market. It is worth around $70 or better; would bring it. The road makes it worth really more than it would for grazing purposes. It is also located so it is suitable for an orchard. Apples could be marketed, on account of the macadamized road, cheaper than on other roads.

In answer to the COURT:

Yes, sir; I exclude from consideration the fact that the Government is in there. Of course, it would cut some figure. I believe it has made a little advance in the price of that land also.

In answer to Mr. JACKSON:

My estimate is exclusive of that advance. The road has made that price and the natural advance in land in the last ten years. I recently bought a farm. I am acquainted with the Paul Beatty land. I think that land is worth $30 to $35 situated on the road as it is.

At this point they raised the question as to whether that increase to the land by virtue of the Government being there should be permitted to be shown.

The COURT said:

I will take the safe course. I will proceed with the testimony as you want it, subject to their exception.

166 In answer to Mr. JACKSON:

It would be hard to tell you how much more the land is worth because of Remount Station. It would be suitable for some horseman to come in there and engage in the horse business and trade with the Government and handle the same class of horses and trade with them there. I hardly know, it depends upon the man's capacity to some extent.

In answer to Mr. O'FLAHERTY:

I think that man would be willing to give about $100 to be around about Remount Station. I heard of some wanting to get close to Remount Station.

In answer to Mr. JACKSON:

In my judgment the Paul Beatty tract is worth $30 to $35. I am acquainted with the Carrie Kuser land. It is unimproved; it has

been recently cleaned off, I think. I would imagine the quality of the land as good as that adjacent that the Government has bought; that is, if it was sodded over.

In answer to Mr. JACKSON:

Who said, "I am talking about the Kuser land."

The Kuser land is rougher than the Beatty land but a different quality of land. It is good grazing land. She has a nice little home. The home I would consider worth $1,500.

Cross-examination in answer to Mr. GILLESPIE:

Yes, sir; if the Beatty land had sod on it, it would be as good as the land adjacent. It doesn't cost much to put sod on. There is some sod on the same quality of land above. No, sir; I have not put
167 value on it because of the Government coming in there. At the present time this land might suit the Government better than it would any individual that I know of. I don't believe any of it has got to the stopping point in price. The price is not exaggerated. I think the Remount Station has enhanced the value of all that land. That road, I believe, made the land worth $70 an acre. I have recently been around and tried to buy land and found it doubled up in value, some places trebled, from ten years ago. My opinion is that the building of the road has doubled the value of the land.

168 BYRD FLETCHER, a witness in behalf of the land owners:

In answer to Mr. JACKSON:

I reside at Front Royal. Lived there for forty-two years. Acquainted with the Paul Beatty land all my life. I figure it ought to be worth about $30 or $35 an acre. Am acquainted with the Carrie Kuser land. All my life. Situated on the pike like it is, I think it ought to be worth $1,500.

Cross-examination in answer to Mr. GILLESPIE:

The land I sold the Government is about three or four hundred yards from the Paul Beatty tract. The land had a fair sod on it. Some parts of the Beatty land has some sod. I don't think my land is as well located as the Beatty, and it is not any more hillier. I think the land on the pike will be worth a great deal more than the land I sold. I was about 100 yards from the pike right across the creek. The difference of 100 yards makes a considerable difference in value. If you see the same locality as I see it, you would think so too. A business man could build a nice house there and it would be worth more. Some parts of mine is better sod than the other. I sold mine to the Government for $25 an acre. I was to get $25 but in some way or other they euchred me out of it. I offered it at $25. They gave me $1,000.

(Here the court sustained the exceptions that other land sold to the Government shall not be taken into consideration.)

In answer to Mr. GILLESPIE:

I got $22.71, about that. I offered it to them at $25 an acre,
169 thought it was forty acres in it, and when it was surveyed, it ran up a little more, and from some cause or other they said, "Oh, well, take $1,000 and I will just take it without figuring about it." I sold them the whole bulk for $1,000. When they come to take up the land I said, "Just take it for $1,000."

170 Evidence on part of the Government.

W. E. LAKE, a witness on behalf of the United States of America.

In answer to Mr. GILLESPIE:

Live near Happy Creek, near Front Royal. Was one of the commissioners. Have never lived on any of this land. I sold the Government a farm. I never lived on this side [indicating on a map].

After pointing out position on map:

It looks like that is the proper position; my land lies right behind Grubbs'. Yes, sir; there is the King land [indicating]. I think that my land is as good as the Macatee, Jackson, and Barbee land, except I don't think it is as good sod. It has been farmed more, and was not in the same condition as to sod for grazing purposes. A good deal of the land has been cultivated. I think it is as level as the Macatee land and as level as the Barbee and some of the Jackson land, but one field of the Jackson land, on the opposite side of the road. I think I sold my land to the Government last July or August. I got $40 an acre for it. I suppose I thought I was getting a fair price for it.

Q. As one of the commissioners, did you go upon these lands with the commissioners and view them and heard evidence?

Mr. O'FLAHERTY. We object to this testimony on the part of the commissioners speaking for land they have condemned.

The COURT. He can answer that question. This is a commissioner who heard the evidence and acted as one of the commissioners.
171 He has not answered yet. I was one of the commissioners who went upon the land. I have not heard the witness testify here. I saw them come in.

Q. Did those same witnesses appear before the commissioners?

Mr. O'FLAHERTY. We object to the testimony of anything that occurred before them or anything that transpired by them in this proceeding, speaking as witnesses and having acted as commissioners, or any evidence showing how they arrived at their conclusion.

The COURT. I will say that the testimony had better be given, and, if I am wrong, it will not be considered, if I find that your objection is sound.

Some of these witnesses testified; some did not. I think the witnesses that testified from Rappahannock was not before us, and some few from Front Royal—two or three, perhaps. All the Warren county witnesses that have testified here testified before the commis-

sioners, with the exception of two or three; Mr. Phillips did, Mr. Wood did not, Mr. Waller, Miss Barbee, Mrs. Jackson, Miss Kuser, Mr. R. H. Jackson, Smith, Thomp-, and the two Messrs. Beatty testified before them. We heard the testimony the best part of two days. We considered it partly as an orchard proposition, and in putting our value on it we did not figure it entirely as a grazing proposition—the price we put on. We took into consideration the new road and other things. The evidence we had before us in reference to prices. I do not know whether the board as a whole took into consideration any increase in value of property by reason of the Government coming in, but I did myself. I thought they should give something by reason of the Government coming in. I don't know whether that
was the sentiment of the board, because we all agreed on the
172 prices. I think my land is equally as good as these lands,
except that it was not so much improved and not as good sod. One tract of the Jackson land, and Miss Lucy Barbee's and Macatee's, if the Government had not come in there, I would have thought $50.

This testimony the court also stated he would hear subject to objection.

I could not tell you how long I have been acquainted with the Paul Beatty land. I have known it a good while. I haven't been over it a great deal. The quality of it, in my judgment, is very poor, very poor; and I consider the Macatee and Jackson and Barbee lands worth four times as much. I mean the one tract of the Jacksons. When I went on the Beatty land it didn't have anything on it; it had scrubby old pine, but they had been cut off, and there was nothing there at all—grass or nothing else—except perhaps one acre. There was an old house sitting up in the field. The house was not anything at all. It was no house, just an old trap now. People lived in it years ago; it is all down now. I don't think the doors were ever on it. I know where the Byrd Fletcher land is. I never was on it, only from the road, and I could not make a definite statement as to the value, but I think it is very much better than the Beatty track; probably twice as good, maybe three times. I could not testify positively because I was never over there; I don't know. Lands have advanced very much there, very much, probably ten or fifteen per cent, since the last four or five years—in the last three years. Mr. Waller's place was sold five or six or seven years ago. I couldn't tell you how much—five or six hundred acres of it. I don't know how much; four hundred acres, perhaps; all on the right-hand side of the road going up; I don't know how much; somewhere between four and six hundred
acres. That was better than any of the Waller farm. I don't
173 know that it is better than any, but better than the other side.

I don't think it is quite as good as the Macatee land. Do not recall what it brought, but I think somewhere in the neighborhood of $27,000 or $28,000; I don't know definitely about that. Wm. Brown had about three acres—one-half of it was creek bottom and one-half of it good sod. The rest looked like it had been washed over, and

the house was a log house, in very good repair—sort of a cabin. House worth $150 or $100. Just a log cabin. Not more than five fruit trees. I counted them; I did know, but I could not tell positively now how many. I think there were five bearing and four or five small ones, but it has been since March since I have been there. I recall the Kuser tract of nine acres; not fit for anything except grazing purposes. The house was small and fairly good. I suppose a house like that would cost about $300 or $350. The Smith Thompson land is very good. Fifteen acres of that is very good, and the other five is very good grazing land, but wet. It has been cultivated, but not in grass. The piece on the other side of the road, where the house is, is in good condition; well improved. I think I put it at $1,500. Yes, sir; some orchard on Mrs. Jackson's land; not very much. I don't know exactly how many trees. I didn't know exactly—that is, to a dot—where the line was between the Jackson's and Mrs. Lucy Barbee's, but I don't think it was more than ten or twelve trees. There are more on the Barbee land, and they are all very old trees and looked to be in good condition. We were there in March, and could not tell very much about them.

In answer to the COURT:

I did not live on the land I sold to the Government. I live at Happy Creek and that is about two and one-half miles from the land I sold the Government and about four or five miles from this land. I rented a farm for years right alongside the Barbee and Macatee and Jackson land.

174 In answer to Mr. GILLESPIE:

The Jackson land on the south side of the road was in bad condition when I looked at it. It had been farmed and was not in grass; looked like it had not been sown in grass; grown up in briars and timber had been cut off. The fence proposition is pretty bad in the whole country. It is hard to tell about that. Not much fencing anywhere. Wasn't any fencing at all on the Beatty land; a little bit around the road, just a wire or two to keep the cattle from going out.

Cross-examination in answer to Mr. O'FLAHERTY:

No; I have not heard the testimony of all that has been before this court. I heard those that came before me. Only one testified that the Macatee land was worth $100. That was Mr. Phillips. A great many testified that it was worth $75. I don't think there was a one hardly that did not testify it was worth $75. We partly paid attention to this. We increased the price a little for that. A great many testified that the Macatee land was worth $75. Of course, we were sworn to price the land according to our own judgment. Yes, sir; we were sworn to take in the evidence if we thought they were honest in it. Yes, sir; we thought they were honest. We did not take their judgment because we thought the land was too high. I put my judgment against all their testimony. We did not have

before us Mr. Koiner, Joseph Reid, G. W. Kinsey, L. B. Moore, Byrd Fletcher, T. V. Leach, Mr. A. W. Dearing, George W. Settle, and James Fletcher; I do not think Mr. Wood was there; he might have been, I don't remember. If Mr. Koiner and Mr. Dearing and these other gentleman who testified here that the Macatee land was worth $75 an acre, I do not think it would have had any effect upon
175 my opinion, if I had had my mind fully made up. I would not have paid any attention to these gentlemen's testimony if I had made my mind up thoroughly as to the value. I expect going over it as much as I did I would know nearly about as much about it as the Commissioner of Agriculture did. Yes, sir; the testimony, as I stated in the beginning, increased the value. I know Mr. A. W. Dearing, a very successful man. There is no question about his being one of the richest and most successful farmers in Virginia. I would have respect for his judgment if he was on the premises and went over it and viewed it and saw it in all seasons; but these gentlemen didn't see this land only occasionally—that is, riding on the road. I might consider the matter, as to my judgment against Mr. Dearings', if he went over it with me and he valued the land at $75, and I put it at $60; then I might have considered his judgment, but I wouldn't like to take his judgment riding along the road. If he had been one of the commissioners I would have considered the proposition with him. He can have good judgment if he is not a commissioner. If there are not any other people in Warren County who have as good judgment as the commissioners they are in a bad fix.

(As to the Paul Beatty land.) There is land that I have sold at $5 an acre. Does not lie along the pike; about two and half miles from Front Royal. Not on that pike. Yes; there is some land within two or two and one-half miles from Front Royal not worth fifty cents an acre, I expect. Yes, sir; there is land near Happy Creek more valuable on account of minerals. Location and distance from Front Royal or close to the roads are not always the criterion of value. I do not know whether blue grass would spring up if the brush and stuff were burned off. If I owned it I would make a terrible effort to make it worth more than it is, but I would not like to pay over $15 an acre for it. I don't believe you could get
176 it into good sod. I suppose it would get into sod. This is slatey, very washy, and very steep, and it is hard to hold anything there to keep from washing anything away. It is not on top of Slate Hill, but it is leading off from Slate Hill. Slate Hill is the top. This land is down about 250 yards from the top of Slate Hill. Well, I think $15 is a just compensation for that land. It is about $5 more than I would pay for it myself. I don't aim to buy land unless I can buy it cheap, if I can help it. If it was mine I would gladly take $15 an acre for it. I got $40 for my land, because it is better land, one acre of it is worth three of this. It is different soil, different altogether; it is better land than the land that the Government bought that adjoins it; it has not got that slate in it. It has

got a deep subsoil. This land has nothing but rock ledges and pine bushes; been cut off. Of course, the land can possibly be improved; I don't say it can't, but it would take a lot of money to do it. It was known as the Dick Dodd property ever since I was a kid. There has been nothing done to it that I know of. I think Richardson and Downing grazed it. There is no fence between the land the Government bought from Downing and Richardson and this. It is not as good as Downing and Richardson's. Some of it is the same character and some of it is not. I do not know whether they got $40 or $45 for that land. This lies right along by it.

Witness points out on map.

This land here [indicating] is not so good, but this land running up here is five times as good. This land right behind here is not quite so good. This land over here is more valuable. Some of the Paul Beatty land is the same character as the Downing and Richardson; it is better as you go up the hill. Yes, sir; right there [pointing] there is quite an abrupt declivity. Right on this corner there is a very good piece of land in the Downing part. Slate Hill
177 is on the top of the hill here, on the Downing and Richardson land. The land down below [indicating], in my judgment, is much better; that is my observation. I said that I don't think there is much more than ten or fifteen per cent increase in the last two or three years. They are asking bigger prices for the land. I don't know whether it is on account of the Government or what the trouble is. The Lord only knows what the Government wants with this Paul Beatty land. I do not know what they are buying it for. I suppose they are buying it for grazing purposes, but I didn't ask them the question. I heard they were going to raise horses. I got $40 an acre for mine. They told me they were going to establish a remount station. No public roads run to my farm. Three or four years ago I paid $26.80 an acre for it and sold it for $40, a gain of $13 an acre. The conditions under which that land was sold made it a little more than 10 per cent rise. Had I no competitor at this time to bid on this land, it would not perhaps brought $40. My land is steeper than the Jackson, but not the Barbee. It is not steeper than the Macatee land. There is no right of way through my land. This is the old Johnson Lake land. It is on the same ridge that comes through the Macatee land and the elevation is about the same. I suppose three or four hundred feet above the road. Don't go down to the road anywhere. We have a right of way through that part of the Charles Lake farm, and we had a right of way through that place and through my brother's place to the road. The only way we can get to the public road is through other people's land. My land is not on the side of a mountain. That is the best land on the farm. That is why I bought that land running through there. The Macatee, Jackson, and Barbee land—the best land that they have is on top that ridge running from the Charlie Lake place, the place that I sold the Government. I think that everybody that knows
178 anything about it, knows that that is a fact. The Gardner

land is good all the way, and the Macatee land is good land, as good as anybody's up there. I don't think we put the Macatee land at too low a price. I don't think it is cheap at all; I don't believe it would pay more than three or four per cent. I thought it was high price when I did it. I did it because I was so anxious to give them a fair price for it, because the Government was buying it, I guess. I think the option on my land was taken in February, and I closed it, I don't know whether it was April or May. I did not have any better offer for it until I closed it; not until it was time for them to close it. A man told me if I could get off from the Government he would give me $500 more. I didn't try, because I had given them an option; but this same man who made me this offer had turned the land down at $40 an acre. When we made this view it was in March, about the 16th or 26th. Grass had not started; looked pretty gloomy. I did not take a gloomy view of the land because I knew the land. No snow, very pretty day. There was no sleet. I don't think there was any sleet that morning. There might have been a little sleet that morning, but it was all gone before we went on the property. We didn't go on the property until half past eleven. There was Government horses on Miss Lucy Barbee's and Mrs. Jackson's land. They had trampled it up very badly, very badly; in very bad condition.

Redirect examination in answer to Mr. GILLESPIE:

A man came to me and offered me $500 more than the Government, and I went to Captain Conrad and told him I would have to know that day. One surveyor that I bought it from made it 259, and the other fellow when I sold it made it 246.

179 In answer to the COURT:

We asked Mr. Phillips how did he know about it. He said he had gone down in the ground with some instrument and inspected it (the soil), and that that land would grow Albemarle poppins, and that it was not very much land that would grow Albemarle pippins. Yes, sir; that point was considered by the board. I considered it, as far as I am concerned. Mr. Phillips had an opportunity to buy this land. He bought land right close to us at Linden, and, if this land was of superior quality for apples, it seems to me that it would have been wise for him to have bought that.

Recross-examination in answer to Mr. O'FLAHERTY:

I don't know that he could have bought this land. This land was never put on market. I think he could have bought it. I expect he could. I don't know anything about it. I did not tell Mr. Bob Jackson that we did not take into consideration the orchard proposition. I never said a word in my life about it to any man. Mr. Phillips did say he would take the land at $75 an acre. We considered it for both, as I said in the beginning. For grazing purposes I do not think that land would be worth over $50 an acre alone.

In answer to the COURT:

I graze cattle on my land. I have known this land and grazed by it for twenty years, been on half dozen times a year—stock trespassing backwards and forwards. We put a value of about $10 for the two propositions. That was our final conclusion. The increase of the value by the Government and road. The road and the Government coming in added to the value.

180 G. O. LEACH, a witness in behalf of the United States of America.

In answer to Mr. WEAVER:

I was one of the commissioners appointed by the court to assess the damages to the lands involved in this litigation. I reside right near the land where we condemned (indicating land, pointing to No. 33). I have known the land all my life. I think that the land sold by me to the Government is the same quality of land, but the Macatee land is in better condition than our land, better grass on it. Our land has been cultivated and not such a good sod. I received about $36; a little over $36 an acre for mine. I sold it last year sometime; in August. The land outside of the Beatty land is pretty good grass; it is very good grazing land. It is rough land, a great deal of it. I heard the testimony of Mr. Phillips. He said it was good, it would produce apples; said that it would produce Albemarle pippins because it was high. He said he had made a test of the soil.

In answer to the COURT:

I think he told us that that quality of land was comparatively scarce. He said that all of the land off that ridge would bring red apples, he thought, if I recall his statement.

In answer to Mr. WEAVER:

I do not know what is the difference in value between my land and the Macatee land, I might say one thing and somebody say another. I should say twelve or fifteen dollars, somewhere along there. We thought that the Government coming in there had increased the value of the land, and took it into consideration, also the highway. The Paul Beatty land is thin, very thin, has no improvements on it; log cabin unoccupied, or a cabin of some kind; I don't know
181 whether log cabin or frame. There is some wire around the county road, a few strands of wire. Very little blue grass on it. I saw a patch about the size of that table up there, I think; I have always considered the condition of the soil very thin. I do not know whether it could be turned into blue-grass sod or not. If you manure it, probably you might. I expect it would grow into sod if you put manure enough on it. I am acquainted with the Byrd Fletcher land. The Fletcher land is very much better than the Beatty land, always been considered better; there is no question, I don't think, about that; $15.00 is what we put it at. I viewed the William Brown house and lot. It is a small house, log house, I be-

lieve, probably a story and a half, two rooms downstairs, I think; had a very good little garden, some apple trees, I don't remember—four or five—and on one side is a creek that runs clear around it, and the road on the other side. I suppose $80 would build that house; certainly $100 would be a good price for it. Some of the land is subject to overflows from the creeks and washes. The Carrie Kuser land is very steep, a good deal of tight rock on it. She has a small house, log house; I suppose it is 12x14 feet, maybe larger. The house, I suppose, is worth $140, maybe less. I do not know the average value of the land. There have been no sales made in there; very few sales of that land have been on the market, except some of the very sorriest land in the Gap, probably. I recall the land sold to Mr. Waller, it was as good as any he had. I don't think it brought $30. I don't know. That was 6 or 7 years ago; I had forgotten that sale being made.

Cross-examination in answer to Mr. O'FLAHERTY:

It might have been 10 or 12 years since Mr. Waller bought
182 the Gardner land. The only sales that have been made of land through there have been the sorriest part through the valley. The Lake land I consider good land, and the King land probably. That land has not changed hands very often. Part of the Lake land I consider as in Chester Gap. It is on the ridge, just the same as the Macatee land is. All the Macatee land is not in Chester Gap, but it goes to the road. Our land is 30 or 40 acres in Chester Gap. Our place runs to a hill on one side. Quite a hill. Call it a mountain in a great many countries. When I sold my land, I retained about 40 acres. I think I sold just as good land as the land I kept. I kept the land right around the house. With all the improvements, and we optioned all of it. When we assessed the Macatee land, we did not take into consideration the fact that they were not getting any benefit, because all of the land was being taken. I think I put the Beatty land at $15 an acre. I do not see how a man could get any money out of it—a greater amount of money out of it, or a greater value on it. I do not know whether he could sell it for more, it might bring more and it might not. I should think it would not be worth more than that. You can't show me any land around there that is as poor as that. I could not show any land around there that could be bought for $15. I think there is some land there about two miles north of the town, the Garrison land, that was taken down because they could not get any more. That was north of the town. That is in Cedarville district. I do not know if there is land over there that is worth only $2 an acre. I was trying to get the value of that land when we were assessing it. I do not know that Mr. Byrd Fletcher's land is very much more precipitous or steep. I don't think that there is any comparison whatever between the two tracts of land. I do not think it is the steepest land up there. I think some of the Beatty land is
just as steep; the hills are not so long; they are shorter but just
183 as steep. The Downing and Richardson land that touches the Beatty land is not any better than the Beatty land, some of it,

and you would have to drive a little further to get to the road. You can go down through the fields, there is no regular roads. There is a wagon road through there. We frequently went through there with wagons. My land does not touch the highway at any point nearer than half a mile. You can go over that road to our place—the Chester Gap road. The Government use it every day. The regular road is down to the Linden road to Front Royal. There is a hill between my father's place and this land. Right of way from this land was never questioned. I do not know whether we did or not. Nobody ever questioned our going through there. People are very kind to people and let them go anywhere they please over that mountain land. I do not know whether the Kuser house is 12x14 or 12x16. It is a small house, I did not measure it. I not think that it is twice that large. I do not know whether it is or not. Do not know whether my judgment is about the same as to the value of land as to the size of the Kuser house or not. I do not think that house is 28 feet long, but I never measured it. Went inside of it. It is a very narrow house, I remember. The commissioners were with me; it was in March, I think. It was a bright day, I think, no snow on the ground as far as I remember. You could see all the grass. It had made a very good start on the Macatee and Barbee land, that is, you could see all the grass that was there that was going to make a start on the Macatee and Barbee land. You could tell sod land from bare land. Mr. Donaldson, Mr. Lake, Mr. Yates, and myself went there the same day. Mr. Koiner did not testify before us. I believe he is land commissioner. We did not have his testimony before us as to the value of the apple lands in Virginia. Had Mr. Phillips as an expert. We thought the Government and the new road had increased the value of it. I do not know how much, do not know as I put any
184 particular price on the increase, or value on the increase. I allowed it, but don't know so much per acre. Think the new road increased the value about $8 or $10. The Government $12 or $15; do not know. Do not know how much the natural increase has been in the land the last five years. I heard Captain Gardner say he paid $100 for some four acres. Never heard that the larger tracts brought $57.50 an acre. I know that my father paid $25 for the land he sold the Government, and we bought it at auction sale about 15 or 17 years ago for $14. The depression in 1890 affected it for a few years, I wouldn't say 10 or 15. Not much increase from 1890 to 1900, some increase since 1900 to 1910. Do not think such a great increase. I do not know that the land up here is worth more than any land in Shenandoah Valley for grazing purposes, outside of the river bottoms. Grazing land is the most valuable land. That flat will grow much more grass, the grass is very much thicker; there is not so many rocks down there. Blue grass grows naturally in the limestone country. You can go on that Marshall land and find blue grass knee high—land that has not been plowed. That land has been cultivated in that smooth country and blue grass don't have an opportunity to grow, but, if you don't cultivate it, it will grow. Some of

the Chester Gap land is rough and some smooth. More or less all blue-grass country. I believe, if you covered the Beatty land with manure, grass would grow on it. Some of it has been lying there ever since the Indians roamed over this country, I reckon. It might go to pieces if nothing grows on it. Cattle would keep the briars and bushes down, sheep wouldn't. Depends upon what Mr. Koiner says, whether it will affect my judgment or not. If he had said that this land was worth from $75 to $100 an acre, it would not have affected my judgment a bit in the world. If there had been any of
that land sold for that, I would have thought so. To some
185 extent I went by what that land had been selling for. The
King land had been sold and the Gardner place had to be settled up and was bought in by relatives. That is the extent of the purchases in that valley. This is just as good blue-grass section as is in Warren County. I don't know that it is so much better than the Smith land above Linden. Some say it is, some say it is not. The Smith land is a big tract. I do not think Col. Delaney owns any land there. He sold it.

In answer to the COURT:

If Mr. Koiner and Mr. Phillips had given testimony that this land was well adapted for pippin growing and that land that would do that was confined to a limited area, I would still have put the same value on it. I believe it will grow pippins, some on that ridge there myself. It is not worth while to have Mr. Phillips on the stand to establish that fact to my mind.

In answer to Mr. O'FLAHERTY:

I did not hear the testimony of A. W. Dearing, George W. Settle, James Fletcher, Joseph Reid, and George W. Kinsey, John M. Johnson was before us, nor my brother, T. V. Leach, Byrd Fletcher, and their testimony as to the value of the land would not have made a bit of difference to me. We were appointed to put a value on that land, and we had to do it according to our own judgment—good, bad, or indifferent. Yes, sir; I did go according to the testimony; we took it into consideration and valued it. If they had testified to what some of these others—Mr. Phillips—did, it would have been about the same; we would have given it about the same weight in some of his testimony, I agreed with him. We could not decide according to any-
one else's judgment. I think it would have been useless to have
186 brought these witnesses again before us. Mr. Phillips stated it
was worth $75 an acre for apple purposes. If these gentlemen had testified that our valuation was too small, I don't think I would have put it any higher than I did put it. I do not think the Macatee land is worth $75.00. I put my judgment against all of them. Creek runs through the Smith land—a large creek. I do not know how far it extends over the mountain; I have never been up on the mountain; there might be some springs up there; but there is a large creek running clear through it, from one end to the other.

In answer to Mr. WEAVER:

There is a road from that house to Front Royal. Very good road; can be made a very good road with very little work.

Here Mr. Gillespie stated that they had other commissioners, and if the court would like to hear them we will put them on.

And the court said:

"This is the first case of this kind that I have ever tried, and I find some novelties of law in it to me. I can see room for a difference in counsel as to the method of the court in trying this case and what is to be considered by the court. I have taken the notion that I would like to see the commissioners and form my own opinion of what sort of men they are and what weight should be given to their opinion. Now, I do not know whether that is right or not; I confess it is a new proposition to me. Speaking from the standpoint of a layman, if I saw a sorry lot of commissioners that I thought were prejudiced or did not know much about land I would give very much less weight to their opinion than if I thought they were high-standing men and tried to do right and who knew what they were about."

187 Mr. GILLESPIE. They are here and we would like for the court to hear them.

G. O. LEACH, a witness in behalf of the United States of America, recalled.

Recross-examination in answer to Mr. JACKSON:

Yes, sir; it was in the evidence before the commissioners at the time of hearing at Front Royal that the Government, through Capt. Conrad, did offer Miss Lucy Barbee $6,000 for her land. We recalled Capt. Conrad to find out why it was not carried out, and he said that when they surveyed the land they found out that it was short; I don't know how much—ten or twelve or fourteen acres. I do not know whether we allowed Miss Lucy some $1,200 less than the Government had offered; I think we allowed her just a little more. He said he offered her the same price he bought the Charlie Barbee land at per acre and she refused to take it. Yes, sir; our report shows that we allowed her $75 an acre for 85 acres and 20 square poles.

Mr. JACKSON. That makes $4,702.50.

In answer to the COURT:

When we fixed the damage on that land we knew the facts about the offer the Government had made.

In answer to Mr. WEAVER:

Yes, sir; Miss Lucy Barbee also testified. I don't remember whether she explained that part or not.

Here the court stated that if the counsel were willing he would examine the commissioners himself, which was consented to.

188 J. W. DONALDSON, a witness in behalf of the United States of Amerira.

I reside in Warren County, near Chester Gap, about four miles from Chester Gap. I have been over the Macatee land a heap—quite

a number of times in the last five or ten years, you might say. Have not been on the Barbee and Jackson land very much. You come further on down to Paul Beatty's. I was never on that, only going along the road. And then Miss Carrie Kuser's lands, I was never on that until I was appointed commissioner. I am a farmer. Have never had much connection with grazing cattle, mostly sheep. Do not know anything about apples. I do not raise any for sale or anything like that. I am 39 years old. No, sir; I did not understand when I was acting as commissioner that the Macatee and Barbee and Jackson land had any peculiar value as apple-growing lands, not until the evidence came before me when we were trying to get at the value. This evidence made an impression on my mind; we tried to consider all the evidence that was before us. Mr. Phillips said there was a small ridge adapted to these Albemarle pippins, and that was a part of the Macatee land, as well as I can remember. Yes, sir; I had a right to take his evidence. I was under the impression that the Jackson and Barbee land did not have any peculiar value for pippins. There was not any evidence showing that. Mr. Phillips stated that it was a good site for orchards, but he stated emphatically about this ridge of the Macatee's being good for pippins. We rode over it carefully.

In answer to Mr. GILLESPIE:

We took into consideration the increased value by reason of the Government coming in and the road. When we went up to the Paul Beatty land it was in an awful condition; it had grown up with
189 pines and stumps. Part of them you could not drive over with a wagon; and the brush all over there, and it made a bad appearance. Awful steep. There is a big ledge of rocks in it. A man could not ride up it.

Cross-examination in answer to Mr. O'FLAHERTY:

We were about 2 days examining the land. We went on the 25th and 26th of March. We went out in the morning between 9 and 10 o'clock and got back the first day about 4 o'clock; do not remember exactly. Did not come back about 2 or 3 o'clock the first day. We rode over the tracts that the court direct us to go on; just rode over them—looked at them; just once across and around through the tracts; rode over them generally. I do not know how many miles we rode on the Macatee tract. We went up there and rode backwards and forwards. We went in and crossed the ridge and went up the ridge. It is divided into two ridges. There is a long ridge and then another ridge coming down. Went up one ridge and down another and around it, clear around in front of Mr. Waller's house and across in front of the broomsedge. We were a day or two at it; we would not agree on the prices. Some of it there was a great deal of difference in and some of it there was not. It did not take us two or three days to agree, but there was an awful lot of evidence before us, and we had to hear all that. After we heard the evidence it did not take us long; about a day—that is, I mean to say, the day we were there

in the courthouse. Mr. Phillips said there was a limited amount of pippin land in Virginia, and that the ridge of the Macatee's land was especially adapted for it, and that ridge would bring a considerable amount of money in these pippins. He did not say that all the Macatee land was good for pippins. I could not take into consideration what I did not hear. My impression was that there
190 was one ridge on the Macatee land good for pippins. I suppose I would believe Mr. Phillips. If Mr. Koiner, the commissioner of agriculture, had come before me and stated that this land was especially valuable for fruit—a limited amount of it was in this country—it would have increased our ideas of valuation of it. We put that land at $60 an acre. I thought it was pretty high then.

Q. I ask you the question, Would you or not, under those circumstances, think $75 too high for especially good pippin land?

A. I don't know anything about apples.

Q. And you were not considering it from an apple standpoint much, were you?

A. Yes, sir; I was obliged to take his evidence.

Q. I am not talking about his evidence, but I am talking about whether you regarded it more as an apple or grazing proposition. Which did you consider it mostly?

A. We considered——

Q. I am talking about you now, not "we."

A. Mostly for grazing—I did.

191 T. F. YATES, a witness on behalf of the United States of America.

In answer to the COURT:

I reside right at the edge of the town of Front Royal. I am a farmer. Grazed cattle all my life. I take a reasonable interest in the apple question; I am not an enthusiast on the subject. I think the testimony of Mr. Phillips as to the real value of the lands right far-fetched; in other words, from my limited knowledge, I would not select the land that he selected as an ideal place for an orchard, as I thought there were drawbacks to it that were not set forth. I took into consideration that there was a turnpike road up there, and the Government coming in and the remount station increased the value of the land.

In answer to Mr. WEAVER:

I have resided in Front Royal since October. I had been at Front Royal for years; part of my family were there going to school. Prior to this I resided in Rappahannock, about six miles from the Macatee land, I suppose. I live on the same road that has been testified to from Front Royal to Flint Hill. I have charge of the Wakefield Manor, owned by the Gordan brothers, Bazil and Douglas. When I took charge of the management there eighteen years ago there were 6,000 acres in that place, and we would raise anywhere from five to six hundred cattle on there. I bought a part of that estate. I have been raising cattle thirty years. I was raised by my uncle, who was

always a cattleman, and always had cattle, and had from 1,000 to 1,200 cattle—Mr. James Yates. I have known the Macatee and Barbee lands some forty years. I passed it right often—thousands of times.

In answer to Mr. O'FLAHERTY:

192 If I had heard the testimony of Mr. Koiner, commissioner of agriculture, as to this land, I would have had my opinion about it. I do not know that I would have given him any more consideration than I did Mr. Phillips. I don't know that I would. I would still have had my opinion as to the suitable location for apples. I am not much of an apple enthusiast. I think it was over-estimated. I thought the country had gone wild on the subject of apples.

In answer to Mr. GILLESPIE:

I went on that land under oath to consider everything, and I gave the testimony that I heard along the line such weight as I thought it deserved. I did put out an orchard on Wakefield Manor property I had management on for seventeen years, and in locating the orchard, of course, I got what information I could along the line of Mr. Wood, who has since died, who held, or did hold during his life, the prize of the Paris Exposition for apples grown in Rappahannock County. I planted 2,000 trees, I think. I have raised some apples and sold some year by year. Do not know the business success of people in apple business; I heard more of it than I have seen.

In answer to Mr. O'FLAHERTY:

The Mr. Wood I spoke of was the father of the young man who testified.

In answer to Mr. GILLESPIE:

I am one of the directors of the Front Royal National Bank.

193 A. L. WARTHAN, a witness in behalf of the United States of America.

In answer to Mr. GILLESPIE:

I live at Front Royal; have lived there for about thirty years, I should say. I am commissioner of the revenue. I am president of the Front Royal National Bank, and I sell horses and farms. I have no connection whatever with the Government. I have been commissioner of the revenue 15 or 20 years. I don't remember what year I was elected, but I should say as long as 15 years. This land is in my district as commissioner. We have only one commissioner in Warren County. I was first elected about 18 years ago; then I resigned and went to New York in 1900. Then I was appointed again 5 years ago, I believe. The clerk gives me an alienation list of all the sales or transfers of land during the year, on which is a description and price of the lands. I then transfer that land on the land books. I make up the land books; in fact, all the taxes are audited through my office, both real and personal. The different prices at which lands are transferred in my county come under my personal observation if the consideration is properly set out in the deed. I know all these lands. For about 25 years, I should say. Have been over them

many a time. Am acquainted with the land through Chester Gap section pretty generally. Chester Gap, I should say, lies north and south, or nearly so, and there is a road that runs right through the center of Chester Gap Valley, as it were. The land generally, as I know Chester Gap, inclines east and west; that is, the eastern slope towards the ridge and the western slope and the valley is nearly the same width all the way through. It is hardly a valley. It is a road through the mountain, yet you would call it a valley. A stream comes nearly parallel with the road. At the lower end of the
194 mouth as we get into Chester Gap there are some ledges; you go into a ravine as you go into what we call Chester Gap, and the majority there are about the same formation. It is generally fairly rough. I have fox hunted over it a great deal, and, of course, when you get up on the plateaus for a width of 100 yards, I should say, it is smoother, but the face of a great deal of it is rough; that is, as I rode over it one piece was plowed up, with oats, and a gentleman with me said, "I don't see how anybody would ever plant oats here on such ground as this." I told him it was all the same kind of land.

Mr. O'FLAHERTY. Don't tell what anybody else said.

In answer to Mr. GILLESPIE:

I am acquainted with the prices at which lands have changed hands in that section in the last few years. There has been very little of that land changed hands. I am speaking now of Chester Gap; I was going to speak of any that had changed hands. The first tract was the Webster land, sold by Mr. Irvin to a man named Morrison, about three years ago. It is a part of the land that the Government——

(Here the witness stopped.)

I am trying to find the Webster land. That tract of land [indicating] changed hands about three years ago. It brought between $4,000 and $5,000. There was about 300 acres; I forget how many acres there were in that. About $15 an acre, I think, that land sold for. That is blue-grass land. The next tract was the Ben Leach tract, which Jim Grubbs bought. His wife had a share in it. I don't know whether I could say positively. I couldn't give you a price on that. About $20 per acre.

In answer to the COURT:

195 That is about seven years ago. The next tract that I recall was the Smith Thompson tract, which he bought from Miss Lucy Barbee. That was a small tract of, say, twenty acres, for which he paid about $600. That may have been eight or nine years ago. I am not sure about that. The next tract is beyond that, Mr. Waller's land, for which he paid in the neighborhood of $10,000 for about 400 acres; $25 or $26 an acre, or may be $27. I am not sure.

In answer to the COURT:

I should say that was within the past five years. I am not sure as to that. It might have been longer. It might have been six or seven years.

In answer to Mr. GILLESPIE:

I would not think it would be over seven years. I don't think it was over five.

In answer to Mr. O'FLAHERTY:

Q. About twelve years, as a matter of fact?

A. That may be true.

In answer to the COURT:

My best opinion that it was not over seven years, and I thought it was in the neighborhood of five.

Mr. O'FLAHERTY. We except to the testimony about the Waller land as too remote.

The COURT. I think myself it is wholly remote, but I don't think it ought to go out; I think it ought to be heard.

196 Mr. GILLESPIE:

Q. Mr. Warthen, are you acquainted with the prices paid for land in that same section that were purchased by the Government?

A. Yes, sir.

Mr. O'FLAHERTY. The same exception to this testimony, as the Government purchases all the time.

The COURT. That is subject to exception.

In answer to Mr. GILLESPIE:

I had been talking to Mr. Hay about the matter of Remount Station, and Capt. Conrad came to Front Royal, and I drove out with him to look at land in Warren County, and when we came into Chester Gap neighborhood, which was possibly the second or third day, we drove up on a hill, and he said, "I like the looks of this country pretty well," and we discussed it. He asked questions about it, about its 'vailability for grazing purposes for horses and what I thought of it, and so on, and he said, "What do you think the land is worth?"

Mr. O'FLAHERTY. We object to that.

The COURT. I don't think that is proper.

My opinion as to the value of that land through that section at that time is thirty dollars an acre. After that I secured opt'ons on about 10,000 acres of land, 5,000 of it being in Chester Gap, and some of the remaining 5,000 being adjacent to or nearby. Well, the prices ranged from $20—I think $20 was the lowest price I secured an option at, and the highest was Mr. Jackson's, I think, at $60; Mr. Bob Jackson. That is not mentioning some little house and tracts of an acre or two with a house on it. I am speaking of the land. Many of these little tracts I did not mention about at all at that time.

197 Here the witness indicated on the map the Macatee tract, the Jackson tract, Barbee, King, Grubbs, and R. H. Jackson tracts, and stated:

Most of the Chester Gap land is about of the same character, practically both sides of it. Of course, there are exception as to little lots

r fields, but the general character of the land is about the same as to value. There is not a difference of $10 an acre, unless you cut off the best, or some little piece; there is not a difference of $10 an acre in practically any of it, starting at Mr. Waller's or Billy Robertson's and coming through the entire Chester Gap. For instance, taking acre for acre, I would say that the King tract is about the best tract, because Downing had improved it a little more, and it was about the smoothest tract of land. As a purchaser, I would rather have bought it than any tract in there. It belonged to Mr. Henry Downing. Capt. Conrad bought it from King. Yes, sir; it was Mr. Downing who owned it for a number of years. He sold it to King about ten years ago. I consider it the best piece of land in there and in a better state of cultivation. The R. H. Jackson tract is the same nature of land and just as good as the King land, except that Downing had moved a lot of stone; he had built a little more stone fence. It has less rock than the Jackson land. The surface of it is smooth. The Grubbs land adjoins it, and it is about the same nature of land. The Grubbs land had been farmed more and was not as much blue grass on it. Some of this [indicating] had been cultivated a little more and was not in good condition.

This Lake land compares favorably with any of this; as a matter of fact, that one field of Lake's is about the best field Remount Station has. The Leach land compares favorably with the other; pos-
198 sibly not as well cleaned off; there might be a little more growth on it; but, as a matter of fact, there is just a fence divides them, and that is practically the same land. This is on the ridge—the Macatee, Lake, Leach, and Grubbs, and so on, with the Brierer. We optioned the Grubbs land at $45; the Lake land at $40. I think the Leach land original option was $50; it might have been $45. I forget that. I know they took off something, and there were some little reservation made—the home reserved. I think they paid somewhere from $30 to $35 finally. The Downing land, $55, or $50, I think it was. I would not be positive whether $50 or $55. My recollection is it was $55. We optioned the R. H. Jackson tract at $60, and a year later, when we went to pay for it, he took off $5; we paid $55 for it. The Fletcher land and the Webster land are not as clean and not worth as much money as the Barbee land. We come to the Barbee land next. The soil is probably about as good, and the land was in cleaner condition. The Barbee land is quite as good as the Jackson land—about the same thing. Then the Richardson land. Charlie Barbee and his sister and Mrs. Jackson has land over here, I think. I am not sure where her tract is, because there was no fence. That is all in one body. Optioned Mr. Charlie Barbee's land at $50, and Miss Lucy Barbee's land was optioned at $6,000, and we thought that we were getting, say, 115 acres, I think. I mean the land books call for that, and I think she thought she had that much. I think that was her statement to Capt. Conrad and myself. I am not sure about that, but I know we thought there was more land than there was, and we figured it at $6,000; I would say $6,000 for 115 acres; that is my

recollection. She had an old home, and I know that she said she should have more money because of having her old home. Charlie Barbee's land was $50. Land adjoining that is Mac Richardson's.

We optioned that tract at $50, and he took off $5. He is the
199 treasurer of the county. Blue-grass land. It is about the same as the Macatee. Some of it—I should say about ten acres of the Richardson land—is pretty rough; fairly rough; but it is about the same land. About 150 acres, I think. We got that at $45 or $40, I don't remember which; I remember he dropped $5 an acre. We call that No. 35 on the map—the Dilger and Brierer land. They are not worth as much as the Macatee land, but I would say $10 an acre—not as clean as the Macatee land—and they are very hilly. The Macatee land is on the Chester Gap road. The soil is about the same, but the location of the land is not as favorable as the Macatee land. We had the whole thing optioned, and he let us take what we wanted at $30 an acre. We optioned the Brierer land at about $30 an acre. I am not sure, but it was in the neighborhood of $30 an acre. The Brierer land was recently sold. He bought that land from Peter Johnson's estate within the past five years, I should say. He bought that tract for about $5,000; not over $6,000. I forget how many acres he had. He bought that land at from $15 to $20 and sold it to the Government for $25 or $30. My recollection is $30. I consider the fair cash value of the Macatee tract of land at this time about $50 an acre. That is what he optioned it to us at. Mr. Macatee had control of this land up to the time we optioned it. He is the father of the people who claim the legal title to the land. I think it was Mrs. Macatee's maiden property. I don't know about the title. He always transacted the business, and I secured the option from him. He bought cattle and he bought sheep, and I bought horses from him, and some of the property he priced me. I was thinking of buying a piece of ground from him for an orchard the same year we got this option. They owned some land next to Front Royal. He priced me three different tracts of that land. I didn't buy any. As a matter of fact, he transacted, as far as I know, all of the business, both while his wife was living and after her death. He priced the Macatee land to me at $50.

200 Q. How long did that option stand before objection was made to it?

Mr. O'FLAHERTY. If you are talking about an option, we call for the option.

The COURT. I think that is too collateral to require the best evidence. I think it is admissible evidence. I think it is collateral to the point in issue; therefore, it is not necessary to produce the best written evidence of the exact terms of the option.

Mr. O'FLAHERTY. We save the point.

In answer to Mr. GILLESPIE:

I should say that option was taken in the spring of 1910. Quite some time after that before I heard of any objection being made to

the option. That year the bill failed to go through—I should say it was the following winter when I took up the renewal of the options. Mr. Earle came to me and said "Warthan, Captain Macatee hadn't any right to option you that land." We had quite a conversation about it. I don't recall the conversation. He probably would. I think it was the following winter. When we started the following winter to ask for the $200,000 we then started to renew options. I had only taken options for one year, and knowing that we would not get the money soon enough to close the options, and before we could get the money, I endeavored to renew options which we had, and it was about the same time as I was renewing options that he came to me about it. I think it was renewed, I am not positive. Upon reflection, I believe it was after the option had been renewed that he talked to me about it. I would not be positive about it. I believe it was renewed. If it was renewed, it was renewed at the same price, and I now think it was renewed. I think it was just after this renewal; possibly Mr. Earle had heard of it in that way, and
201 said something to me about it, but I would not be positive about it. There were so many little details and discussions about renewing these options, I am not clear. I think Mrs. Jackson's tract is just such land as her husband's. As a matter of fact they are in the same field with no fence between them. I think $50 an acre is a *a* fair value for it. Since that road has been built that land is worth ten or fifteen dollars more than it was before that road was built. I said the land was not worth over $40. I told Capt. Conrad that. As a matter of fact, I told him it was worth $30, but he would have to pay $40 for it; so that was my estimate at that time, and now I think the road enhances the value of any land ten or fifteen dollars an acre; that is, any land contiguous to it. Same things as to Miss Lucy Barbee's land. I am acquainted with the Paul Beatty tract; it is a small tract of land and looks pretty bad condition. I have never been over—I have never ridden over it. There happened to be a little embankment and a fence around it, and while we fox hunted all around it I have never ridden over that tract; and I never walked over it. At the time I asked for an option on it, I didn't go to look at it as I had a good deal of land; I did not consider it in the same way. I was looking for the owner of the Paul Beatty tract and was told it belonged to Ben Brown's widow, and I heard she lived at Harmony Hollow. I took Mr. Garret with me to introduce me and drove to see her. As we approached the house we got out, and Mr. Garrett met Beatty going up. He lived just beyond her. I possibly said to him who he wanted to see. He opened the door, took me in and introduced me to Mrs. Brown, and I told her the Government wanted to buy some land and would like to buy this land of hers. She was a very old lady. She said that Mr. Beatty attended to things for her, and did not talk very much. I mean by that I got very little satisfaction from her. I didn't worry about it,
202 and as we came out I had a conversation with Mr. Beatty. He said, as a matter of fact, his son practically owned the

land or did own it. I said, "Have you a title for it?" He said, "No." I said, "Why don't you get a title for it and sell it to me or give me an option on it?" He said well, he would close it up, close the matter up. So he came down to my house a few days after that. I possibly saw his son in the meantime and asked him if his father has attended to this, I am not sure about it. At any rate, they both came to my house within a week or maybe within a day or two, Capt. Conrad happened to be there and we lunched together. I asked Mr. Beatty what he would take for the land. In fact, he showed me a deed for it. I said "What will you take for it?" The deed called for $1,600. I said, "That is too much money, Mr. Beatty," and he said well, it hadn't cost him that much money; and during the talk (I don't remember how it came up) I offered him $1,000 for it; I asked him if he wouldn't option it at that. He said no, he would not. That happened after luncheon. We stayed around for a while and I think Capt. Conrad left, and after he left and as Mr. Beatty left, I said, "I will try to get Capt. Conrad to give you $200 more. I don't know that I can, but I think I can get him to give you $200 more for it." "Well," he says, "you ask him to make it $200 more." I said, "I don't think he will do it; I don't think he will consider it." About a week after that or maybe two weeks, Capt. Conrad——

Mr. GILLESPIE. Your honor understands that this evidence we put in is in answer to evidence they put in over our objection, but the court took it under advisement. If the other goes out we don't want to put in this evidence.

About two weeks after that Capt. Conrad said to me, "Have you seen anything or said any thing to the Beattys about the
203 land?" I said, "No; I have not." He said, "I wish you would attend to that." The next time I met young Beatty I said, "Paul, what are going to do about that land? Are you going to let the Government have it?" He said no; that he had had a conversation with Capt. Conrad and he was not going to let him have it; that he said he would condemn it and would have to condemn it. That is the last I had to do with it.

In answer to the COURT:

Yes, sir; I have seen the Paul Beatty land frequently many a time.

In answer to Mr. GILLESPIE:

I think I could give you a fair idea of the value of it. It is a part of the Downing and Richardson tract practically, except it that has been owned for twenty or thirty years by other people and hasn't had as good attention, and much of the soil has washed off; has been allowed to grow up; had been but recently cut off, in small pines, cedars, and scrub oaks; and there is a ledge running through it where the stone outcrops, along through one part of it, but I have never walked through it, because I did not consider it of much importance.

In answer to the COURT:

I would not think $30 would be at all excessive value to pay for that, remembering the smallness of it. I would not think of giving

that for it if it was a large tract of land; but with the closeness to town and any small tract of cheap land will come near selling for more than its value than a larger tract of land; I mean there are more purchasers for that kind of land than other land.

In answer to Mr. GILLESPIE:

As I stated, I have not been on it, but I know the soil.

204 Q. How can you know it if you havn't been on it?

Mr. O'FLAHERTY. I don't think he can cross-question his witness.

A. It is a small piece of land and it is in very plain view of the road. I own a piece of land from which I can throw a stone to his land. It is across the creek on the other side of the road. My land is better and I bought mine for $20 an acre, and I should have wanted to have bought that ordinarily for myself for not more than $20 an acre, but I say, because of the smallness of the tract and its nearness to town I would not consider $30 an acre an excessive price for it, and at the time I asked him to sell it to Capt. Conrad for $1,200. I thought then it was forty-one or forty-two acres in the tract, and that $30, as I thought about most of the land, was a good, big price for it. At the same time I thought the Government could afford to pay $30, especially as it was in the corner of the tract. The upper five acres or possibly eight acres is now in blue grass. That had been cleared off, but the blue grass had not been disturbed; and then you strike this ledge with practically nothing on it. Yes, sir; I should say there is more than two acres of blue grass on it; same kind that is on the land adjoining that comes of its own accord. That is on the upper edge that adjoins the Downing and Richardson land. That about the house has been cultivated a great deal. Yes, sir; I have seen corn and potatoes on it. It is a lot. I don't think there has been much fence—a wire or two in front of it. Two or three acres around the house has been cultivated. Yes, sir; pines and shrub oaks on it. The part of it that I speak of has been cultivated; runs down towards the first hollow. The next is an incline when you leave that little hollow. It has been grown up for a good many years. I told Capt. Conrad that

205 although $300 was a fair value for the William Brown, colored man's property, we offered him four or five, trying to get away from the condemnation proposition; that is, in many instances we offered more than we thought it was worth rather than to go into condemnation.

In answer to the COURT:

Three hundred dollars is a good value for it.

In answer to Mr. GILLESPIE:

I should say the Carrie Kuser land is worth about $750. I am acquainted with the Garret tract. [Indicates on map where it is.] This is the part of the Beatty land that has been cultivated, and this part up here I stated had blue grass on it. This is the Garret tract. About six acres in it, I think. I forget the acreage. I value it at

$400. He asked me to try to sell it to Capt. Conrad for $400. He said he would take $400 for it.

Mr. GILLESPIE. I want to call the attention of the court to the fact that the commissioners allowed him $750.

After we commenced closing these things, I know he came to me afterwards and said he would not take less than five after he had mentioned four. When I was securing options I tried to get an option from Hercelia Mattox. She would not option it for less than $50. I did not take it. I did not take an option. I offered to take an option at $40 and she would not give it to me. About 200.

Mr. O'FLAHERTY. We except to all this testimony about property we are not excepting to.

The COURT. I understand.

In answer to Mr. GILLESPIE:

I told her I would take an option on it for $40.

206 In answer to the COURT:

Q. You offered $40 and she demanded $50. What happened?

A. We didn't option it, and in selecting the 5,000 acres we left her out.

In answer to Mr. GILLESPIE:

She sold it to Capt. Conrad recently. She sent for me a few months ago to sell it to Capt. Conrad for thirty-odd dollars; I should say $32 or $36; I forget the exact amount. I should say that the Macatee, Barbee, and Jackson land was worth $15 an acre more than the Maddox tract.

In answer to the COURT:

The Jackson, Macatee, and Barbee lands are worth $15 an acre more than Mrs. Maddox's. It is on a better road and *and* better location.

In answer to Mr. GILLESPIE:

Not a great deal of difference in the soil. Her's was not quite as good. The principal difference is in the location. Her land has been farmed a little more than the other. The general nature of it is the same. I know where the Marvin Maddox land is located. It compares favorably with any land Capt. Conrad has bought. It cost $30. We optioned it at $40 and he dropped $10 when we went to close it.

In answer to the COURT:

It compares favorably with these tracts now in dispute. The Macatee and Barbee. It is not as well located; the nature of the soil and the condition of the land is good. It cost $30 and it is over the hill in Harmony Hollow and not on this main road to Rappahannock, but it is on the Harmony Hollow road.

207 In answer to Mr. GILLESPIE:

We took option on similar and in Rappahannock County. About a mile from this land possibly, and nearly two miles further south, right over the top of the mountain, just starting into Rappa-

honnock County. I consider it as good as the Chester Gap land—very similar land and been in blue grass a long time. We optioned it at $40. Eighteen hundred acres in one tract of Mr. White. He sent his son-in-law to me afterwards and asked me to sell it to Capt. Conrad for $30, and he wants to sell it now.

In answer to the COURT:

The owner told me he would take $30. The land was about the same elevation across the mountain as Chester Gap, starts close to the mountain and runs down the mountain, and embraces practically all of that southern slope of the mountain—the southern and western slopes of the mountain.

In answer to Mr. O'FLAHERTY:

Yes, sir; I mean eastern instead of western. The mountain is not a long one; it is about a mile and half up the mountain and a mile and a half down. The other side is possibly a little shorter than this side.

In answer to Mr. GILLESPIE:

He offered this land at $30 to me within the past thirty days. We got option on the Downing place which adjoins it—Henry Downing's old house—about 500 acres, I think. I got that option (that amount was gross) at $15,000. That is $30 an acre.

Q. At about what has this land here in this section been assessed?

208 Mr. O'FLAHERTY. We object.

Mr. GILLESPIE. I propose to prove that lands are assessed at about a certain point of their value.

The COURT. I may find that certain evidence is admissible. I think I had better hear it; I don't think it is admissible. It may be. We will hear it and take it subject to exception.

In answer to Mr. GILLESPIE:

Lands were assessed at about one-third or one-fourth of their value.

In answer to the COURT:

Usually assessed the value between third and fourth.

In answer to Mr. O'FLAHERTY:

I first became acquainted with Captain Conrad I should say in the year 1909, in the spring.

In answer to Mr. GILLESPIE:

The road in Chester Gap was voted on in 1910; I should say in the fall of 1910. I am not positive as to that. I got an option from Mr. Waller on his land. I think it was $55. At the time I asked him for an option he was one of the first gentlemen I talked to about the matter, because he had a large tract of land, and I told him what the scheme was, and asked him if he would option his land; and he said he would. I told him what I had told Capt. Conrad about what

I thought of the value of it. When I went up to secure the option he wanted me to put it down at this much, if it was $55. I told him that I thought it was foolish for me to start with any such proposition as that, because it was more than he had indicated to me he would be willing to take for his land, and that these options would have to be gotten and the Government would have to know what they were going to do before they would consider buying the land, and that was beyond the amount that he had discussed and that I had understood he was willing to take for it. He said, "That is true; and while I am perfectly willing to take less for it, and will take less for it, I am not willing to option it for that, because I do not care to tie it up for a year under any consideration." He said, "You can know and be satisfied in your mind that there will be no trouble about that, and I don't care to option it for less than that." That is about the conversation.

In answer to the COURT:

This is the Mr. Waller, who testified last night.

In answer to Mr. GILLESPIE:

This option was gotten, I should say, in the fall of 1909, say in November, maybe in December—I am not sure about that. It included his entire holdings, house, improvements, and all.

Cross-examination in answer to Mr. O'FLAHERTY:

I think I met Capt. Conrad in the month of May, 1909, at Will Carson's house, and met him on the train at Riverton Junction. He was coming to Riverton to look over the land and county with a view to locating Remount Station. I had first taken up with Mr. Hay the question of Remount Station possibly a year before that, or may have been a year and one-half or six months; I could not be positive. Mr. Hay is Congressman from the seventh district. It was Mr. Hay that induced me to think of Remount Station near Front Royal, and he suggested it. He knew I had been in the horse business and was a horse man. I selected Warren County, because I lived there. I thought of Chester Gap, because I was hunting for blue grass; we first drove towards Linden. Capt. Conrad said he did not like the neighborhood. We came across the road, turning towards Linden half a mile from town and turned towards Chester Gap and drove into Chester Gap. We drove from there to Winsboro Mill, going south. After you leave Front Royal for, say, a mile or a mile and quarter, the land is not so good as what we term Chester Gap. For the first mile to Winsboro Mill is creek bottom, practically level. It is good for farming purposes but not so well for grazing. It is creek bottom; you know what creek bottom is; typical creek bottom that lies along the base of the Blue Ridge Mountains. When you get beyond that point for a mile or a mile and a quarter you come into what we might term the mouth of Chester Gap. It is a ravine, practically a gorge; you go around through it. The mountain starts down here [indicating] and you

commence going up the mountain until you get up to the extreme end of the Semer place. That is on a little mountain. The north side of land is blue grass land coming over to Pete Locke's and down to his house, but this portion there [indicating] much of it is on a bluff, and between the old Winsboro Mill it is a bluff kind of a mountain spur.

Here indicates the Beatty land.

This creek comes down here and runs through this gorge, and the road winds around through this gorge here. It is rather a picturesque mountainous section.

Q. When you come to the Beatty land you are on an incline?

A. Yes.

Q. At what point is the point known on the road as Slate Hill?

A. Slate Hill is about the Carrie Kuser house.

211 Q. When you get to Slate Hill you are on practically what you might call—you are up a hill? This up in here [indicating] is the Chester Gap proper?

A. That is right.

Q. A little valley here?

A. Yes, sir.

Q. When you get a little farther up to Happy Creek, the first creek you come to as you come up to the right, is what is known as Harmony Hollow Creek, and they mark it here "West Happy Creek"?

A. Yes, sir.

Q. That leads up into a distinct valley of its own?

A. Yes.

Q. That is known as Harmony Hollow?

A. That is right.

Q. Between Harmony Hollow and this Chester Gap what is the character of this land?

A. Very similar to this land [indicating]. This is the Barbee land running up to the top of the ridge [indicating].

Q. Isn't there a mountain between here [indicating]?

A. Yes, sir.

Q. All this mountain section [indicating]?

A. This is a mountain just as this is a mountain [indicating]. The creek that runs down this Chester Gap Valley is nearer to the mountain on the Harmony Hollow side. It is practically parallel with the road, and it is not far from the road at any point. When you come up to the brow of this hill, or what we call Slate Hill, there is practically a plateau clear to the top of the mountain. I consider this land [indicating] as good as that. The road at the mouth

212 is not quite as far, but as you go farther up and as you pass the Slate Hill the width of it, the land to the left-hand side as you go up is not any better.

Q. Isn't that really the best blue-grass section in Warren County?

A. Well, that and that of Mr. Johnson's father's and Tom Smith's down at Linden, Henry Downing's and Dilger's are the only blue-grass section here [indicating]. To get to Mrs. Maddox's land you go over the hill into Harmony Hollow, go off in this direction, and Chester Gap goes in that direction [indicating]. One is in one valley and one, the other, about one-half a mile beyond Slate Hill. I have been dealing in horses all my life. Rather an expert in the knowledge of horses. Buying and selling horses for jumping purposes and saddle horses; for ten years I have sold $50,000 worth of horses a year. Yes; I selected this as a good place to raise horses for the United States Government. I recommended it to Capt. Conrad and told him I thought it was an ideal place for it. It is not so rough that it can not be well grazed. It is well suited for grazing. I think it is an ideal place for the purpose for which it is sought. I think it is better than smoother land for the purpose. I think the lands in Warren County have increased from thirty-three to fifty per cent in the past seven years. Lands changed very little in the past 25 years until prior to seven year ago. They commenced to pick up a little ten years ago, but I should say it was seven years ago they commenced to go up. Land sold eight or ten years ago would not be a good criterion of the value of land at the present time. I think lands are worth 3½ per cent more to-day than they were
213 ten years ago. The best lands have not changed in value so much as the other lands. The land in Chester Gap is held by, say, four or five families. I can remember or recall four or five sales, not more than that. The Macatee land is in better condition than the Hercelia Maddox land. The Macatee land is quite as good as any tract of its size in the gap. The King tract is about one-half the size, and having had more attention paid to it, it is more valuable. Some of the Macatee land is better than the King land. Should say one-fourth of the Macatee land is better than the King land. Jim Grubbs owns the old Gardner homestead. It was purchased by the Government for $45 an acre from Jim Grubbs. I got that option at $45; he may have reduced it. The cause of these people reducing these options was because I told them that we had not enough money; that the mountain land we wanted would have to be gotten within $200,000, which was all the money that we had. Yes, sir; we told them that we had a certain amount of money; that they would have to take some off their options if we could not keep within that amount. This land slopes east in the direction of Mt. Marshall. The Dilger and Brierer land is hardly across the mountain. You come from the Macatee land on to the Brierer and Dilger land without any incline at all. The Dilger land comes on a level, and back of the Leaches you go down a hill to the creek. No; you can not see over half of Warren County from Capt. Leach's; it is down under a hill. His land is not as high as the Macatee. Macatee's land is about a mile from Leache's, due south. I should say the elevation would be about 350 feet from the road on to the back line of the

Macatee land. It slopes to a distance of about 350 feet. The
214 Brierer and Leach land is further south toward Linden. You start in, say, Chester Gap Road; you come to a plateau and follow that a little, and you go on a little on Macatee's. There is a house, a barn, and a little cove, and you continue in about the same way on up the mountain. The Dilger land is north of that and runs down lower. The Dilger land is not considered in Chester Gap. The Brierer land is just in the rear of the Macatee land. Do not know if they have any right of way. I know Mr. Waller's land very well. It is good land. I think most of his timberland was on the other side. I do not know his line. He runs up towards Ed. Kuser's. While I have fox hunted over every field there and gone into the woods, I don't know his line. I think it adjoins Billy Robertson's; I know it does. All the other people, except the Macatees, have cleared their land up against the mountain side. Mr. Waller has quite a body on the right-hand side in front of his house, or southwest of his house, towards Harmony Hollow. I do not think that the land that is not cleared is as good a grade as the land that is cleared down in the valley, but I am not familiar with the timber on it. I think it is possible to do something with it on account of the rocks. I do not know the value of Mr. Waller's timberland, because I have never had occasion to look into it. The following year, when I went to renew options, Mr. Waller said he would not take less than $75 an acre. When I took the option on Mr. Macatee's land I think I knew he was insolvent. Possibly knew of judgments against him and that he only had courtesy in her estate. I did not consider titles of the lands; I only took statements as to how much land they had
215 and how much they would take per acre for it. I took it from Mr. Macatee because he generally looked after that farm or his wife's farm. I think I learned from Mr. Earle a year and two days after the first option that they would not take the amount of his option. I do not think it was right after the first option. I could be mistaken about it, but I think not. I know perfectly well Mr. Earle told me Capt. Macatee had no right to sell the land. As far as I know, as soon as it did come to their knowledge they did say that they would not sell. I never talked to the ladies at all. I got word through Mr. Earle. No; Capt. Macatee did not tell me at the time it would be no good unless the ladies signed it. I knew they made some settlement with the creditors, but I don't know what it was. Mr. Macatee has not been a successful business man. I know A. W. Dearing, George W. Kinsey, Frank Wood, and James Flecher; all of them are capable, first-class business men. Mr. G. W. Settle was a member of the legislature along with me. Mr. Dearing is a very successful man. Mr. Waller is a good successful business man. I do not think I know anything against the character of any of these men who testified on both sides. Men of good character, good standing, and good business men.

Q. You spoke of Mr. White's land in Rappahannock. Isn't it a fact that land is clear across the top of the Blue Ridge in a cove—the elevation of that land two or three hundred feet or four hundred feet below the top of the mountain?

A. It extends to the top of the mountain on the right hand side of the road—all on the right hand side of the road from the top of the mountain down, that is, when you get beyond Billy Robertson's, belongs to White.

216 Mr. Downing's home place is further removed. It is adjacent to this land. It is known as Black Rock. I should say it is about eight miles from Front Royal. The Jackson and Macatee lands are about three miles; the three mile post is right on the land. I do not think it is worth twice as much as the land in Rappahannock. They will have the same road now, or will in a week or two. Mr. Downing did not ask me $30 for his land of 500 acres eight miles from Front Royal. He optioned it to me at $30 and Mr. White adjoining at $40. Everything considered, I do not think that the Macatee land is worth $80 an acre.

In answer to Mr. O'FLAHERTY:

I told Capt. Conrad that $850 was sufficient for Miss Kuser's home. That is what I think about it. No reason to change my mind. I doubt if it will pay interest on that. I look at values along that line. She bought that land at about $120. She has a very fair house on it, of the kind. I dare say the property cost her about $400 or $450, entire property, not more than that. We brought some land recently from Mr. Byrd Rutherford. We got 18 acres from Byrd Rutherford right next to it for $800; he only asked that for it. I would rather have his property than hers. My interest in securing these options for the Government was my desire to see the remount station established in Warren County and in Virginia. Yes, sir; I sold them some property, I got $40 an acre for Belmont. I sold them, I think, $26,000 worth. I sold them 670 acres—between six and seven hundred acres. I retained the house and 150 acres and the home. I paid $20,000 for Belmont. I said I paid $20,000 and sold a portion of it for

217 $26,000 and got the house and 150 acres left. I value the house and 150 acres at $10,000. I paid $20,000. I optioned it I guess before Capt. Conrad came in here. I should say it has been about three years since I optioned it, may be three and one-half. The part that I sold Capt. Conrad, barring I should say 50 acres across the extreme western side, that on the edge overlooking the manor road, is as good land as he has got. Well, it starts about a mile and a half from town and runs back a mile or a mile and a half.

Q. Isn't your land a white rock—whitish—rather than the same sort of soil in Chester Cap?

A. There is no white rock there that I can recall.

The highest elevation point in my land is about 800 feet above Front Royal. Fifty acres of Belmont is in woodland. I should think that there was not over 15 acres of it that would not make fine

grass land. As a matter of fact, the woodland is some of the best land there, some as smooth and quite as good. I have heard that the woodland on the Macatee land was very good. I have ridden through it, but I don't know much about timber.

In answer to the COURT:

Yes, sir; the Belmont place is shown on the map.

In answer to Mr. O'FLAHERTY:

Here witness explains in answer to question and points on map as to location of Belmont. Belmont is on the north side, practically on the side of the mountain it faces the same direction the Chester Gap Road runs, comes down towards Front Royal.

218 Redirect examination in answer to Mr. GILLESPIE:

Marcus Buck put it (Belmont) on a high state of cultivation. He spent thousands of dollars clearing it and putting an orchard upon it. The fields I dare say are smoother than most of the land he has, because the rocks have been piled. I should say one-half of it I sold him was in blue grass and the other was being cultivated. He sowed a hundred or two acres of oats up there this spring. I regard it of equal value, with the exception of 50 acres, with the Macatee and Barbee lands; it has as fine blue grass as any there. Because of the fruit on it we always considered it a valuable place; had had a good deal of money spent on it. With a good cellar on it. I never have gotten a cent of money out of it any way for the assistance I gave. I never expect to get any. I did not sell the land for two years afterwards. Would never have sold him that land if Mr. Waller had left his option, as we expected to get it. He expected to take Mr. Waller's land. He had to buy this because he could not get that to make out the 5,000 acres. The Belmont land is practically a smooth, level piece of land, and good meadowland. I dare say there has been more hay mowed from it than any tract of land on his entire tract, because Mr. Buck spent a great deal of money on it, and then Mr. Alf. McCay took it and had it in a high state of cultivation. I sold it for $26,000; I think I got the value of it.

In answer to Mr. O'FLAHERTY:

Q. Did Mr. Buck or Mr. Ashby or yourself ever graze any land except a cow or two on Belmont—any steers or anything like that?

A. Oh, yes, sir; Mr. McKay had as fine a herd of cattle as we ever had.

219 ROBERT LEACH, a witness on behalf of the Government.

In answer to Mr. GILLESPIE:

I reside at Huntly, in Albemarle County, now. I lived in this section on the Leach land that we sold to the Government—the tract of land by the Lake land. It compares about the same in quality and value as the Macatee, Jackson, and Barbee land, but it has been cultivated and not in as good condition now. It has been cultivated. I guess it lies well. It is not as clean—more brushes on it. I sold it last year. We got about thirty-six and two-thirds dollars. I con-

sider that I got a very good price for it. I think $60 an acre would be a good price for the Macatee land. In fixing that price I take into consideration the road that has recently been built up by it, and its adaptability for fruit growing, and any other qualities it might possess to enhance its value. The Jackson and Barbee tracts about the same price—practically the same conditions. I have lived in that county practically all my life until I sold out to the Government; away about four or five years in that time. I know Mr. A. W. Dearing.

Q. I want to know, if about a month or six weeks ago, in coming by this land with Mr. Dearing (the Macatee land), you heard him make a statement, or if you had any conversation with him in reference to the value of that Macatee and Jackson and Barbee land?

Mr. O'Flaherty. We object to the question.

The Court. I overrule the objection.

Mr. O'Flaherty. We save the point.

A. I was riding along the road with Mr. Dearing, going to Front Royal; there came up something about remount land; that they were condemning it. I asked him if he thought the commissioners allowed fair value for it. He said he thought they did; that he wouldn't like to pay over $30 an acre for it.

220 I consider the King tract the best tract of land in Chester Gap, the piece Mr. Downing owns. I know the Belmont tract; not as well acquainted with the ridge over there as I am with the other ridge. I lived on this other side and was never over there very much. The fields there on the ridge look like good land.

Cross-examination in answer to Mr. O'Flaherty:

Mr. Dearing spoke about the Macatee land. We were along there about Mr. Waller's, just below Mr. Waller's. No, sir; we were not talking about the Paul Beatty land. He said the Macatee land is rough and steep.

Q. Do you believe that Mr. Dearing would come here and say on oath that he thought this land was worth $75 an acre if he did not believe so?

Mr. Gillespie. We object to that.

The Court. I don't think that is admissible. I sustain the objection.

Mr. O'Flaherty. We save the point.

I do not think he said he was getting old and he wouldn't buy and land now. He said, I believe, as well as I can remember, that it would not make interest on more than that; he would not like to undertake to make interest on that. He would not buy that land because he could loan his money at 6 per cent interest. Do not know whether he has been very successful with interest; he is said to be. He said he would not like to pay more than that. I am not well enough acquainted with the Belmont land to know whether it is as good land as the Chester Gap; it is about the same soil, that

221 loose, black chestnut loam. I was never on Belmont. I heard

Alf. McKay had a registered herd up there. It is a fact that he used it entirely for vineyards, and it was known as Belmont vineyards. I have walked over the Barbee, Waller, Jackson land. I guess it is the best blue-grass land in the country on each side of the mountain. I expect three acres would fatten a steer in one good year.

222 Captain C. H. CONRAD, in behalf of the U. S.

In answer to Mr. GILLESPIE:

I am located at Front Royal in charge of Government lands there and engaged in acquiring some more lands. I am in service of the Government. Am captain and quartermaster at present, and depot quartermaster, so called, at Front Royal. I have been engaged in getting up these lands in Warren County for remount purposes, and the lands in question in this proceeding. I purchased about 4,700 acres at the present, I think—4,600 and something. All these lands have been voluntarily conveyed to the Government. The average price per acre that I have paid for these is $35.71. I have it on a piece of paper—4,514 acres, and the next tract, 185.4 (I think that is all), making 4,699. We commenced after the first of last July, and all ceased before midnight of the 30th of this last June. I am well acquainted with the different tracts of land embodied in this boundary. The Macatee, Barbee, the two Jackson tracts and Smith Thompson tract are very much the same character of soil as the others. Some of the Macatee tract has a little better care than some, but no better than the Bob Jackson tract or the Charlie Barbee tract. The Lucy Barbee tract I have been renting for about a year. The back part of that, the part along the creek, a little meadow on it and up a little hollow towards the mountain, has very good grass on it. The rest of it has no grass at all. Did not have any grass on it when I rented it, and hasn't had any there since. I think the Jackson, Macatee, and Barbee tract in there are worth more money than some of the other pieces. I think those pieces, as far as grass is concerned, are in better condition than the average of the other pieces. I think the Jackson and Barbee lands are worth $12 or $15 more an acre. I

223 know the Belmont tract. Same character of soil, same land as the other. I have had experts on it from the Agricultural Department, and they claim it is the best——

(Court struck out this last.)

I think it is every bit as good as the Jackson and Barbee and Macatee. The land is a bit closer to Front Royal. The nearest part of it is about a mile, and the furtherest part on the back of it is nearly two miles or a mile and three-quarters. As you look at the Lucy Barbee tract from the pike you will find, first, a stone wall, then a creek running through a little bottom, and a level stretch on both sides of the creek. It is in good grass. As you get in front of the house, where it leads up to a piece of woodland with an elevation between the creek and the little depression I speak of, there is fairly

good grass up there. This ridge that goes up quite abruptly from the creek about 125 feet and then goes back with a gradual slope towards the woodland has no grass on it at all. There are 85 acres in that tract, according to the latest survey, and I should say at least half of it has no grass on it. I was very much disappointed to find, after I had rented it, that it was not as good as I expected, and I have had horses on it for a considerable time, and I had to feed them all last year, and I hoped to be able to keep them on grass.

In answer to the COURT:

Q. Is the Remount Station in actual operation?

A. We have 418 young horses on that ground now. The plant really is in town; we graze the horses."

In answer to Mr. GILLESPIE:

I went to Miss Lucy Barbee's one evening along in the winter, or in cold weather, to see about renting her land; also to get an option on her piece. I had wanted to get the Barbee land for some
224 time, because I liked the Charles Barbee's. It had a very fine sod on the top of the hill back of the woodland, and it had a good reputation, and I went to Mr. Weaver's house one evening to see Miss Barbee and her brother to enter into an agreement to lease from them by the year. They had no fence between their properties and they gave the total acreage. Charlie Barbee claimed so much was his and so much was his sister's, and he had seventy-five acres on the other side of the road. I arranged then to rent the whole business and drew up a lease for the two tracts. We then talked about the acreage. I had already consulted the land books. What we talked about that evening lead me to believe that Miss Lucy Barbee had nearly 115 acres—114 and a fraction acres. As soon as I had settled the lease propocition I went to work on the option proposition. Miss Lucy said that this thing had been divided; she had fallen heir to the house and hadn't gotten as much land as a result, and if she sold it she could not afford to do so for anything less than $6,000. And I figured up what they would be an acre. I knew the house was in a bad state of repair; but, of course, it meant something to her. I found that if it contained 115 acres I would get the land at about $52 an acre. Her brother had offered the back part of his at $50; also his holdings on the other side of the road. I took an option for $6,000 for her holdings; and later, before I could have a deed drawn and enter into negotiation for the purchase, I had to have it surveyed. The county surveyor reported eighty-five and a fraction acres. I explained to her that this survey was very much shorter than what she had optioned it to me. She said she thought there must have been some mistake. I asked her if she would get another surveyor and send him out to meet us, and I would have the county surveyor, and if the land proved to be there I would only be too glad to pay her what the option called for, but if it was not
225 there I could not do it. That is the way the thing stood. She said she thought she would send a surveyor. As far as I know

she never has. Later I went back to her and asked her to pro rate the thing on the survey of the county surveyor, and again the question of the surveyor she promised to have there came up. She hadn't done it. I told her if she would pro rate it I would be glad to close it right off. She said she could not take less than $6,000. I said I was sorry, but if that was the case the only thing I could do would be to throw it into condemnation proceedings, which I very much wanted to avoid if possible. I attempted in every way to prevent them from the start. They are disagreeable, and I do not like to have them. She declined to do it; and then I asked that proceedings be instituted. I am acquainted with the Paul Beatty land. The tract of land is directly on the new pike. As you come around the pike on the left there is quite a cut through the hill with a bank on each side probably as far as from here to the wall. Around the front of this is a wire fence, two or three strands. A little bit further up the bank to the right, on about the same level, there is an old shack standing there, with no windows or doors; lying parallel with the road at this point is a narrow piece of fairly good soil. It is this same general character of red soil, although it is quite bushy; there are quite a number of young pines. As soon as you leave the back of the house you dip rather abruptly into a little ravine that starts on the Downing and Richardson tract, commonly known as Slate Hill, and goes down close to the house. There is an outcropping of rock. That part was covered with scrub pine, some of them higher than this ceiling, that was cut off by Mr. Beatty. When he commenced to cut it off I requested him not to disturb that land; that the thing was in condemnation, and it might cause complications, or it might reduce the value of his land and he might regret it, and I thought, as the thing was in court and he had on par-
226 ticular hurry in cutting it that he had better leave it until the court decided what should be done. I saw him and told him that on the street, and several times sent him word. Whether he got word I don't know. After you leave this creek there is a large outcropping of rock. The soil is very thin, and, with the exception of small pieces, I should say, not larger than this room; there is practically no grass on it. There is no fence between the adjoining property except at Garret's place, and I now have horses in there. Right where you would suppose the line fence would be and where these pines end and the clear land commences is a little place that has blue grass on it about the side of this room. At other places you find spurs of blue grass, but there is no sod. There is a good deal of soil there that I would suppose, with the greatest effort and expense, you could put grass on. I have seen lawn put over bricks and things in the city with great effort, and watering all the time. The only reason I contemplated buying the thing was because it was sort of a front door of the Remount Station. The first thing you strike is that Beatty land. It looked very badly, and it was my intention, if I stayed at this work, to put a big arch there so people would know

when they entered the Government land; and it struck me it would have to be fixed up. I wanted to create a good impression. That is the reason I wanted the land. I thought it contained forty acres, and I offered $900 for it, but it was refused. Mr. Warthan afterwards told me he thought we could get it for $1,200. I considered it, but I did not think it worth that, and aside from the fact that I thought it looked badly. Finally I decided to ask for condemnation proceedings. I think $15 an acre a fair value for it. I think the commissioners have put a high value on that. I don't think it worth for any farming purposes that much; but, everything considered, I think it would be a fair compensation for the land. The only consid-
227 eration was one of having a presentable appearance at what I call the front door of the whole things and not for farming purposes; and if I do take that land, of course I have a straight line of fence instead of zigzag fence. The William Brown land is down in creek bottom, just where the Harmony Hallow branch and this Chester Gap branch of Happy Creek come together; just about three acres. I consider $400 a fair price on that. I thought that was a bit more than the actual value, but it was Wm. Brown's home, and I considered the Government could afford to pay that for it. The commissioners allowed him $500. The house is in poor shape. William keeps it whitewashed and looking as well as he can, but I think it is worth from $75 to $100. I consider $750 a fair price for the Kuser tract. The commissioner allowed her $900 or $950. Guess her house is worth about $300 or $350. The Newton Garrett tract of six and a fraction acres has an old cabin on it in a very bad state of repair. It has two or three grape vines and a dozen fruit trees. Do not do very well here. The cabin, I think, is of only one room, and log. We offered $500 for it, after we declined to accept an option on it for $400, and it was not accepted. He offered it to Mr. Warthan, and Mr. Warthan asked me if I would not take it at that. I told him I did not think I wanted it. Later I found out it would be better if I took that Beatty tract to get rid of that unsightly appearance. Of course, the object of the Government is to have a solid block of land. Then I went to Mr. Garrett and told him I would like to take his place, and I offered him $500, and I thought it was a little more than it was worth, but I would give him that. He stated no, he could not take it. That was before I commenced proceedings. The commissioners allowed him $750. This orchard on Jackson and Barbee tract is right back of the Barbee house. It runs back, I guess, 150 to 200 yards from the house, rather narrow strip, and a fence between Mrs. Jackson's and Miss Barbee cut it about in two, with a
228 majority of the trees on Miss Barbee's land next to the house. These trees are seedlings, no particular variety on her tracts. I guess there may be forty trees on hers. I had them counted at one time, but had forgotten. On the Jackson side the trees are not so close together—a lot of trees missing—and the apples are a little bit better. I have eaten apples there. It is nothing but an old house

orchard. The trees are all old, with the possible exception of a few that are probably twenty years old. The others must be fifty or sixty. I attempted at one time to classify by the apples in the Barbee section, and was unable to do it. There is no particular variety close to the house; they are just apples. I never actually had an option on the Hercelia Maddox tract. She offered one for $50, and I didn't think the land was worth that much, and wouldn't take it.

(Objection to this testimony. The court said, "Receive it under objection.")

This tract had originally about 200 acres. She offered to sell it or option it for $50, declined to take anything else, and in making up the 5,000 acres I left it out. I preferred to have it because it widened out the narrowest part of the reservation, but I felt we could not stand that much money for it and I will let it go. Then at various times in the last six months people around came to me and asked me why I didn't buy the Maddox land. I finally found out that she was apparently in a frame of mind to sell. I got the various people to go see her. I finally offered her $7,000, which was all I had left, for her entire holding, about 199 acres. That included house and barn and various things. She said she had to have more than that, and we talked about it again, and finally I sent a man employed by me to see her. He reported that he thought we could get the tract without the house, and we finally *with the house, and we finally*
229 agreed to take the whole thing with the exception of the house and the little orchard, and run the line around her barn, for $6,000. That made thirty-two dollars and some cents an acre—about $32.36. I do not think it is quite as good as the Macatee, Jackson, and Barbee lands. It is practically of the same kind of soil. It has been farmed, it has been sheeped a good deal, and some broom sedge, just like the Macatee land. I think the King land, everything considered, is better than the Macatee, Jackson, and Barbee land. We paid $55 for that.

Mr. O'FLAHERTY. We except to that.

WITNESS. It is very much more level than the other.

In answer to Mr. GILLESPIE:

The numbers on the map introduced, one set refers to letters in the corner and indicate who owns the land. The figures in red put by myself indicate the value per acre for which the lands are bought. The red figures are the prices paid per acre for the different tracts. These numbers on the tracts refer to the index pasted on the map which gives the names of the original owners, or of the vendors or grantors of the Government.

Cross-examination in answer to Mr. O'FLAHERTY:

I bought the King land from Mr. Gus King. I did not know anything about his financial condition at the time I bought it. We bought it from him some time before he died. There was a mortgage on the place, but I don't think he was very hard up, at least, if he

was, I didn't know it. Do not know anything about his being hard up. Do not know what other property he had—yes; I do
230 know, the farm on the river. Do not know if that he was mortgaged up to the hill. The mortgage had to be released and the whole thing settled before the Government could take it over. The part of it was attended to by the attorneys for the Government. Their certificate never states, except that is free from all encumbrances. It never came to me that King was hard up and had to sell his land. Paid about $46 an acre; he had had it about six or seven years. It is good land and capable of being cultivated since I have had it; I have had in three years and leased it, that is the first piece of land I have ever rented in this county. I have bought 4,699 acres of land so far. I kept within 5,000 acres; I was not limited as the appropriation bill finally passed, but the way that it went to Congress, first they required me to buy at least 5,000 acres for $200,000, and at the time the negotiations were entered into that was the way the bill stood. When it finally came from Congress that restriction as to the number of acres had been removed. The restriction as to the amount had not, they placed to my credit $200,000 with instructions that this amount and no more would be spent for land. Part of this money was in the subtreasury in New York City and part of it in the Government depository at Front Royal. In the Front Royal National Bank, of which Mr. Warthan is president. It is the only bank that you can deposit public funds in. You probably know that the Government depository has to be designated by the Secretary of the Treasury before any funds can be deposited. The Government keeps $25,000 there all the time, I think. That is the amount the bank is bonded for, and they keep that amount there. No, sir; I have not expended all the $200,000 Congress has appropriated, I have to-day in my possession exactly what the total of the commissioners' report is plus not quite $200. I have just bought a little spring for $60 and a fraction of an acre; $31,331.34 is the
231 amount according to the commissioners' report. I had charged to me for the purchase of this land $200,000, and the total of the land actually purchased and the land acted upon by the commissioners, for which I reserved this amount, is $199,721.03. The balance that I had in my possession up to the time that I paid for this spring was $278.97. I have yet unexpended or in no way promised and which went back to the Treasury at midnight yesterday, $218.97. Oh, yes, sir; we have on hand money to draw on to pay for this land if it should be confirmed and the title should be vested. I have $31,331.34. I have that conditional, if you want to know the condition. The money does not go back to the Government until the court gets through deciding this matter. I am holding that in my bank account. I virtually hold it. I am required. I can explain that.

Mr. O'FLAHERTY. Make any explanation you want to.

Mr. GILLESPIE. I don't think it is material.

By Mr. O'FLAHERTY:

Q. You haven't any money appropriated by Congress to pay for this land if we to-day should say you should have title?

The COURT. If you want it in the record, I am perfectly willing it should go in. I don't think the court is bound by Captain's understanding of the law, at the same time I expect he has as more accurate, actual knowledge than I have about the way these appropriations are handled.

Mr. GILLESPIE. Of course, it is going in over our objection and exception.

The matter has been put up to the attorney general. I was informed that, since condemnation proceedings were instituted, the money, in spite of the fact the fiscal year had terminated, remained available pending action of the court; that it then rested with the Government; whether they should take the land or not, and, under those conditions, I did not reserve and have as I told you, two hundred and nine dollars and some cents, or did have until the 30th day of June; that had to go back. I have just now $3,331.34, which is the total of the commissioners' report, and no more.

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In answer to Mr. O'FLAHERTY:

I asked my department for instructions as to whether I could draw on this money after the end of the fiscal year and was informed by them, after consultation with the attorney general, that that money could be available if it lasted ten years or fifteen years until this court decided. This money was appropriated for purchasing grazing lands. I wanted to buy the Paul Beatty land for the simple reason it has also been interpreted by the authorities I consulted that anything that was to improve the general appearance or the general welfare of the land and expended in land is permissible; in other words, I have been allowed to spend $400 for land to put a store warehouse on in Front Royal from the store appropriation. That was necessary for the care of the horses. I have taken advice as to whether I could ornament that land with this money. My department advised it. I did not offer Mr. Beatty $1,000; I do not know that Mr. Warthen did. Mr. Warthen did not have any authority to offer him $1,000. He might have said he thought Captain Conrad would pay $1,000; but I have to do the paying.

Q. They put that Paul Beatty land, it seems, as a very peculiar sort of land. One of your witnesses testified (I think you heard him) that it had a patch of grass on it the size of the courthouse and another that had a patch of grass on it the size of that table; and Mr. Warthen, more liberal, said it had two or three acres of grass. Now, which one is right?

A. I think Mr. Warthan is wrong. I think I am about right or I wouldn't say so.

233

Q. You are between the table and two acres?

A. No; I am stating what I consider to be the facts and not considering anybody; that is what I am here for.

Q. Why did you select this particular land for grazing purposes?

A. The best I saw.

Q. In Chester Gap?

A. It is the best I saw, and considering railroads and everything else.

Q. Where had you looked before?

A. All over the State of Virginia—not before, but before we finally decided on this place.

Q. You looked all over the State of Virginia, and, everything being considered, you found this the best and most suitable place for the remount station to raise your horses, considering grass land and the location on railroads?

Mr. GILLESPIE. We object to that.

The COURT. You can state that.

A. As a matter of fact, the remount station had to go in Warren County.

As far as I know this is the best place in Warren County. Have been over the county since considerably. I know just as good blue grass lands in other sections, but, everything considered, it suits our purposes better. It is not the best quality of land. The land
234 is just as good in Rappahannock. Johnson's land and Smith's land at Linden is as good, if not better. Smith's land is not as much on top of the mountain as Mr. Macatee's or King's and a great many others. Smith's land is six or seven miles from Front Royal, but Front Royal isn't in consideration. Most of the Government projects are miles from town. That has to do with the value of the land. Smith's land runs down to the road at Linden. I have seriously considered buying it. No road between there and the railroad station; it is not so bad. Of course, if we had a depot there Linden would be our railroad station. The number of acres in the Barbee tract is undetermined as far as I am concerned. I asked her to have it surveyed; I don't think she has had it done. The county surveyor surveyed it—a man named Anderson. I do not think she told me she had sold Mr. Thompson nineteen acres. I knew she had sold off some and I went to the land books and consulted with and with her brother, and they told me what the combined holding was. I knew she had sold Mr. Thompson about nineteen acres. The difference was twenty some acres. I took an option for 114 acres and it turned out 85. Only one survey made that I know of. Made at the instance of the Government. We always invite cooperation in the presence of landowners.

A. L. WARTHAN, a witness for Government, recalled.

In answer to Mr. WEAVER:

I think Mr. Gus King left an estate in the neighborhood of $20,000.

235 JOHN M. JOHNSON recalled by Government for further examination.

In answer to Mr. GILLESPIE:

I live near Front Royal. Jackson, Macatee, and Barbee lands compare favorably with what we have cleared. I suppose 500 acres of our is cleared. The cleared land is just as good, but it is not cleared up. It would not bring as much by right smart per acre because not located like that. It was not located like that. It was not located on as good road as that. It is worth as much for grazing. It is not worth much more per acre because it has timber on it.

Q. I want you to take it as a whole?

A. I don't understand what you mean.

Q. I want you to take the land you speak of as a whole; how does it compare with the Macatee land per acre?

A. I have told you the land that was cleared.

Q. I don't want the land that is cleared. I want you to take it as a whole?

A. I don't exactly understand.

Q. Do you know what a whole tract is?

A. Yes, sir.

Q. What is the whole tract of land worth taken as a whole per acre?

A. Of course, I am taking it per acre.

Q. How does it compare with the Macatee land?

A. Taking it as a whole with the timber standing there it is not worth as much by right smart per acre.

236 Q. How much?

A. I don't expect it would bring one-half—half as much.

Q. How much cleared land is there?

A. Between four and five hundred acres.

There is 730 acres in the tract. The cleared land is just as good as Macatee land. I expect the cleared land is worth $50 per acre, located like that. The woodland, as far as the land is concerned, would not suit for grazing. It is only worth what the lumber would bring on it. Well, that is what it is worth—what was asked for it. I do not know what the woodland is worth; I think the timber on it is worth——

Q. I don't want the timber; I want to know what the land is worth?

A. I don't know.

Q. I want your opinion of it?

A. It would be not worth a great deal to me.

In answer to the COURT:

Q. What is timber worth?

A. I would ask $3,500 for the saw mill timber standing on it. That is what the land is worth with the timber on it. Of course, the land is worth something, but it would not be worth much to me. It might be worth more to someone else than me.

In answer to Mr. GILLESPIE:

There is more timber on it in proportion than on the Macatee land. I think $23,000 is what I priced it at as a whole—the same timber—as well as I remember. Twenty-three thousand dollars for 730 acres; about that time I was about to get $3,500 for the timber.

(Government rests.)

237 SMITH THOMPSON, a witness in behalf of the landowners.

In answer to Mr. O'FLAHERTY:

I am acquainted with the Belmont land. Lived on it. It is pretty good land. I do not know, sir, hardly, how it compares with the others, it is good farming land. You could not consider it, I suppose, a grazing farm. There are some fields on it; they have never been plowed up at all; they are too steep; but the most of it they farm. The front part of it is pretty steep. The best grazing land on that place, according to what I know about it, is this front part. The other has been used for farming, and I don't think it is in grass very much. I don't know where the line runs, but I think Mr. Warthan has the front part of it. He did not have the best farming land nor the best grazing land if the other was in grass. Now, as I told you, I haven't been up there for some time. It was years ago when I was there. It was never considered a grazing farm I don't think.

(Testimony closed.)

238 And the said court, after the hearing of said testimony, and after argument of counsel upon the said exceptions, took under advisement the sufficiency of the cause shown against the reports of the commissioners, and at a later date, to wit, on August 9, 1912, overruled the said exception to the commissioner's report by decree entered on said date and confirmed the report of the said commissioners, to which action of the court in overruling the said exceptions, and in sustaining the commissioners' report and entering the said decree, the said defendants then and there excepted.

And be it remembered that upon the hearing of the evidence in this cause when J. L. Phillips was on the stand, on cross-examination he was asked the following questions:

"Q. Have you ever heard of a tract being sold for $60 an acre?

"Mr. O'FLAHERTY. I object to his telling what he heard.

"The COURT. I think that that question can be asked by them. Do you know of any land selling for that much or ever heard of any selling for that much?

"Mr. O'FLAHERTY. About the 'heard' part, I don't think that is right.

"The COURT. I don't see any objection to their asking what he heard. I think that would be admissible.

"Mr. O'FLAHERTY. We save the point."

To which ruling of the court the defendants then and there excepted.

And be it remembered that upon the hearing of the evidence in this cause when J. M. Lake, another witness, called by the landowners, was on the stand and testified that he was supervisor of the county, he was, on cross-examination, asked the following questions, and gave the following answer:

239 "By the COURT:

"Q. When were you last elected?

"A. Last fall, last November election.

"The COURT. Ask him whether he is expecting to run again next time.

"By Mr. GILLESPIE:

"Q. Are you expecting to run again three years hence?

"A. I don't know.

"Q. Were you a candidate through that section when the question of the value of this land was up among those people?

"A. No, sir; there was no question up at that time."

NOTE.—The question and answer last above were objected to by counsel for the landowners, which objection the court overruled, and counsel for the landowners excepted.

To which action of the court the defendants then and there excepted.

And be it remembered that upon the hearing of the evidence in this cause when W. E. Lake, one of the commissioners, a witness called on behalf of the Government, was on the stand, he was asked:

"Q. As one of the commissioners, did you go upon these lands with the commissioners and view them and hear evidence?

"Mr. O'FLAHERTY. We object to this testimony on the part of the commissioners speaking for land they have condemned.

"The COURT. He can answer that question. This is a commissioner who heard the evidence and acted as one of the commissioners. He has not answered yet.

240 "A. I was one of the commissioners who went upon the land. I have not heard the witness testify here. I saw them come in.

"Q. Did those same witness appear before the commissioners?

"Mr. O'FLAHERTY. We object to the testimony of anything that occurred before them or anything transpired by them in this proceeding, speaking as witnesses and having acted as commissioners, or of any evidence showing how they arrived at their conclusion.

"The COURT. I will say that the testimony had better be given, and, if I am wrong, it will not be considered, if I find that your objection is sound."

Which evidence the court afterwards considered, and to which action of the court in hearing and considering the evidence of the commissioners, the defendants excepted.

And be it remembered that upon the hearing of the evidence in this cause, when A. L. Warthan, a witness on behalf of the Government, was called, on cross-examination the witness was permitted to testify

as to the sale of lands in the community for five to seven years before, as follows:

"In answer to Mr. GILLESPIE:

"I would not think it would be over seven years. I don't think it was over five.

"In answer to Mr. O'FLAHERTY:

"Q. About twelve years as a matter of fact?

"A. That may be true.

"In answer to the COURT:

"My best opinion that it was not over seven years, and I thought it was in the neighborhood of five.

"Mr. O'FLAHERTY. We except to the testimony about the Waller land as too remote.

241 "The COURT. I think myself it is highly remote, but I don't think it ought to go out. I think it ought to be heard.

"Mr. GILLESPIE:

"Q. Mr. Warthan, are you acquainted with the prices paid for land in that same section that were purchased by the Government?

"A. Yes, sir.

"Mr. O'FLAHERTY. The same exception to this testimony as the Government purchases all the time.

"The COURT. That is subject to exception."

And again when the same witness was on the stand he was asked:

"Q. How long did that option stand before objection was made to it?

"Mr. O'FLAHERTY. If you are talking about an option, we call for the option.

"The COURT. I think that is too collateral to require the best evidence. I think it is admissible evidence. It is collateral to the point in issue, therefore it is not necessary to produce the best written evidence of the exact terms of the option.

"Mr. O'FLAHERTY. We save the point."

Relative to options gotten on the land, the witness testified as follows:

"In answer to Mr. GILLESPIE:

"I should say that option was taken in the spring of 1910. Quite some time after that that I heard of any objection being made to the option. That year the bill failed to go through—I should say it was the following winter when I took up the renewal of the op-

242 tions. Mr. Earle came to me and said, "Warthan, Captain Macatee hadn't any right to option you that land." We had quite a conversion about it. I don't recall the conversation. He probably would. I think it was the following winter. When we started the following winter to ask for $200,000, we then started to renew options. I had only taken options for one year, and, knowing that we would not get the money soon enough to close the op-

tions and before we could get the money, I endeavored to renew options which we had, and it was about the same time as I was renewing options that he came to me about it. I think it was renewed; I am not positive. Upon reflection, I believe it was after the option had been renewed that he talked to me about it. I would not be positive about it; I believe it was renewed. If it was renewed, it was renewed at the same price, and I now think it was renewed; I think it was just after this renewal; possibly Mr. Earle had heard of it in that way and said something to me about it, but I would not be positive about it. There were so many little details and discussions about renewing these options; I am not clear."

And again, while the same witness was on the stand he was allowed to testify as to what property was assessed at for taxation, as follows:

"Q. At about what has this land here in this section been assessed?

"Mr. O'FLAHERTY. We object.

"Mr. GILLESPIE. I propose to prove that lands are assessed at about a certain per cent of their value.

"The COURT. I may find that certain evidence is admissible. I think I had better hear it; I don't think it is admissible; it may be. We will hear it and take it subject to consideration.

243 "In answer to Mr. GILLESPIE:

"Lands were assessed at about one-third or one-fourth of their value.

"In answer to the COURT:

"Unusually assessed the value between third and fourth."

To which action of the court defendants then and there excepted, and the said defendants pray that this bill of exceptions be signed and made a part of the record, which is accordingly done this the 9th day of November, 1912.

(Signed) HENRY C. McDOWELL,
District Judge.

244 *Order confirming commissioners' report, filed August 9, 1912.*

In the United States District Court for the Western District of Virginia, continued and held at Lynchburg on August 9, 1912.

U. S.
vs.
PAUL BEATTY ET AL. } No. 2074.

U. S.
vs.
WILLIAM BROWN ET AL. } No. 2075.

U. S.
vs.
ALMA JACKSON ET AL. } No. 2076.

U. S.
vs.
S. E. MACATEE ET AL. } No. 2077.

U. S.
vs.
LUCRETIA THOMPSON ET AL. } No. 2078.

U. S.
vs.
CARRIE P. KUSER ET AL. } No. 2079.

U. S.
vs.
LUCY E. BARBEE ET AL. } No. 2080.

U. S.
vs.
ELLA S. KENNY ET AL. } No. 2081.

U. S.
vs.
NEWTON GARRETT ET AL. } No. 2082.

U. S.
vs.
MARTHA POMEROY ET AL. } No. 2083.

These causes having been brought on to be heard on July 1, 1912, at Charlottesville, on exceptions to the reports of the commissioners, the exceptants being of opinion that commissioners should not have been appointed, moved in open court that the commissioners' reports be disregarded and that the court impanel a jury to ascertain de novo what was a just and proper compensation for the lands sought to be taken by the United States for the purposes set out in these proceedings, and for reasons set out in a written opinion filed this day, the court overruled said motion, to which action the defendants excepted; and thereupon the defendents moved that the issues of fact as to adequacy of the amounts awarded by the commissioners be tried by jury. This motion was overruled and the defendants excepted. And thereupon the court heard the evidence offered
245 and took under advisement the sufficiency of the cause shown against the reports of the commissioners. And these causes having, by order of July 24, 1912, been transferred to Lynchburg and the court being now advised, it is considered by the court that the exceptions to the reports of the commissioners in these causes be and they are overruled and the court doth now confirm both of said reports, filed April 29, 1912, and it is ordered that the same be recorded by the clerk of this court at Lynchburg, and, when so recorded, be duly indexed by the clerk as required by law.

And the court doth further order that the United States of America pay into this court to the clerk hereof the following sums, which were awarded in these causes by the commissioners:

$455.06 in case No. 2074; $500.00 in case No. 2075; $5,707.81 in case No. 2076; $12,900.00 in case No. 2077; $1,200.78 in case No. 2078; $900.00 in case No. 2079; $4,681.87 in case No. 2080; $275.00 in case No. 2081; $750.00 in case No. 2082, and $3,000.00 in case No. 2083, an aggregate of $30,370.52.

And the said United States having now paid said aggregate amount of $30,370.52 into court as above ordered, it is ordered by the court that the interest and estate of the owner or owners of the said tracts of land set out and described in said reports shall hereby terminate and the interest and estate of such owner or owners shall be vested in the said compensation and damages so paid into court as above set out as was vested in such property so taken or damaged, and all liens by deed of trust, judgment or otherwise, upon said property or estates shall be transferred to said money so paid into court.

It is further ordered that the clerk of this court at Lynchburg shall make and certify a copy of the above-mentioned commissioners' reports filed on the 29th day of April, 1912, and a copy of this order, and transmit the same to the clerk of the circuit court of the county of Warren, Va., in which county the lands described in said
246 report lie, and said clerk of the Circuit Court of Warren County will record in the same in Warren County deed book and index the same in the name of the persons who had the lands mentioned in said reports, and which were acquired by the United States in these proceedings, and also in the name of the United States; provided, that the lawful fees of the said clerk of the Circuit Court of Warren County for so recording and indexing said papers be paid by the United States.

It is further ordered that the clerk of this court at Lynchburg forthwith deposit in the Lynchburg National Bank, at Lynchburg, Va., a designated depository, in the name of this court and to the credit of these causes respectively the sums hereinbefore mentioned, and paid into this court as above set out, and that the same be so held until withdrawn by an order of this court duly entered and certified to said bank.

And to this order the defendants respectively except.

It is ordered that a copy hereof be certified to Capt. C. H. Conrad, jr., at Front Royal, Va.

247 *Condemnation Cases No. 2074 to 2077 and 2079 and 2080.*

Determination of the trial court as to papers to be included in the transcript.

A copy of:

1. The petition to condemn, including the exhibits, in case No. 2074.
2. The demurrer in case No. 2074.

8. The bill of exceptions signed and filed on January 6, 1912, in cases No. 2074 to 2080, both inclusive, marked "Defts'. Bill of Exceptions No. 1."

4. The order of January 6, 1912 (overruling demurrers and appointing commissioners), in cases No. 2074 to No. 2080, both inclusive.

5. Order of June 17, 1912, in cases No. 2074 to No. 2080.

6. The report of commissioners filed April 29, 1912, relating to cases 2074 to 2080.

7. The exceptions to the foregoing report, filed May 16, 1912, in cases 2074 to 2080.

8. Bill of exceptions No. 2, signed August 9, 1912.

9. The order of August 7, 1912, transferring cases No. 2074–2084 from Charlottesville back to Lynchburg.

10. The opinion of this court filed August 9, 1912.

11. The assignments of error in full.

12. A memorandum stating the date of the petition for writ of error; date of order granting writ of error; date of writ of error; date when copy thereof for opposing party was filed in clerk's office of this court; the date, the penalty, the names of the obligors,
248 the condition of the appeal bond; the date of the citation, to wit, August 9, 1912; the date of waiver of service thereof, to wit, August 9, 1912.

13. The bill of exceptions giving the evidence in narrative form heard by the judge of this court at Charlottesville on July 1–3, 1912, and the order of August 9, 1912.

14. This certificate.

It is considered by the court that the petitions to condemn in the cases other than No. 2074 be omitted, as they are identical with the petition filed in No. 2074, in so far as any question raised by the writ of error is concerned. Also that the demurrers filed in the other cases be omitted for the same reason. It being agreed by counsel that the notice, service thereof, and posting and publication thereof were in accordance with the Virginia statutes, it is further ordered by the court that the notices, returns of service thereof and proofs of publication, and posting be omitted from the transcript.

HENRY C. McDOWELL,
District Judge.

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg in and for said district on September 11, 1912.

Honorable HENRY C. McDOWELL, *Judge.*

U. S.
vs.
PAUL BEATTY ET AL. } No. 2074.

U. S.
vs.
WILLIAM BROWN ET AL. } No. 2075.

U. S.
vs.
ALMA JACKSON ET AL. } No. 2076.

U. S.
vs.
S. E. MACATEE ET AL. } No. 2077.

U. S.
vs.
CARRIE P. KUSER ET AL. } No. 2079.

U. S.
vs.
LUCY E. BARBEE ET AL. } No. 2080.

249 It is hereby ordered that the time within which the transcript of record is required to be certified to the Circuit Court of Appeals in the above mentioned causes be, and it is hereby, extended on motion of the plaintiffs in error, for thirty days from September 19, 1912.

It is further ordered that a copy hereof be filed with the clerk of the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia.

STANLEY W. MARTIN, *Clerk.*

A copy. Teste.

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynch'urg on October 14, 1912.

Honorable HENRY C. McDOWELL, *Judge.*

U. S.
vs.
PAUL BEATTY ET AL. } No. 2074.

U. S.
vs.
ALMA JACKSON ET AL. } No. 2076.

U. S.
vs.
LUCY E. BARBEE ET AL. } No. 2080.

On motion of the plaintiffs in error, it is ordered that the time within which the transcript of record is required to be certified to the Circuit Court of Appeals in the above mentioned causes be, and it is hereby, ordered extended for thirty days from this date.

It is further ordered that a copy hereof be filed with the clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.

STANLEY W. MARTIN, *Clerk.*

A copy. Teste.

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, on November 9, 1912.

250 Honorable HENRY C. MCDOWELL, *Judge.*

U. S.
vs.
PAUL BEATTY ET AL. } No. 2074.

U. S.
vs.
ALMA JACKSON ET AL. } No. 2076.

U. S.
vs.
LUCY E. BARBEE ET AL. } No. 2080.

It is ordered that the time within which the plaintiffs in error shall comply with section 1 of rule 16 of the Circuit Court of Appeals be, and it is hereby, extended for twenty days after November 16, 1912.

The clerk of this court will certify a copy hereof to the clerk of the Circuit Court of Appeals for the Fourth Circuit.

STANLEY W. MARTIN, *Clerk.*

A copy. Teste.

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg, in and for said district, on December 2nd, 1912.

Hon. HENRY C. MCDOWELL, *Judge.*

No. ———

UNITED STATES
vs.
PAUL BEATTY ET ALS., AND OTHER CONDEMNATION CASES.

The time for certifying transcript to Circuit Court of Appeals is hereby extended ten days from this date.

The clerk will certify a copy hereof to the clerk of the Circuit Court of Appeals at Richmond.

A copy. Teste.

STANLEY W. MARTIN,
Clerk United States District Court, Western District of Virginia.

251 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Western District of Virginia, to wit:

I, Stanley W. Martin, clerk of the District Court of the United States for the Western District of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings of the District Court of the United States for the Western District of Virginia, made up in accordance with the "determination of the trial court as to papers to be included in the transcript" entered by the court and filed in said causes on August 9th, 1912.

In testimony whereof, I her'unto set my hand and affix the seal of the said District Court this 11th day of December, 1912.

STANLEY W. MARTIN,
Clerk U. S. Dist. Ct., Western Dist. of Va.

[Copy.]

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253 On the same day, to wit, December 12, 1912, twenty-four printed copies of record filed.

February 14, 1913 (February term, 1913), cause came on to be heard before Pritchard, circuit judge, and Dayton and Smith, district judges, and is argued by counsel and submitted.

March 11, 1913 (same term), the court announced and filed its opinion, which is as follows, to wit:

Opinion.

Filed March 11, 1913.

255 United States Circuit Court of Appeals, Fourth Circuit.

No. 1143.

PAUL BEATTY, ALMA JACKSON ET AL., AND LUCY E. BARBEE, PLAINTIFFS IN ERROR,

versus

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

In error to the District Court of the United States for the Western District of Virginia, at Lynchburg.

[Argued February 14, 1913. Decided March 11, 1913.]

Before PRITCHARD, circuit judge, and DAYTON and SMITH, district judges.

D. C. O'Flaherty and E. Hilton Jackson (O'Flaherty, Fulton & Byrd on brief) for plaintiffs in error and Barnes Gillespie, U. S.

attorney (T. J. Muncy, asst. U. S. attorney, on brief) for defendant in error.

SMITH, district judge:

Under the terms of an act of Congress making appropriations for the support of the Army for the fiscal year ending June 30, 1912, approved March 3, 1911, an appropriation was provided for the purchase of land accessible to the horse-raising section of Virginia for the assembling, grazing, and training of horses purchased for the mounted service. In pursuance of this statute, a petition was
256 filed on behalf of the United States in the District Court of the United States for the Western District of Virginia to condemn certain tracts of land in Front Royal magisterial district, in Warren County, Virginia. The practice followed on behalf of the United States seems to have been governed by section 2 of the act of August 1, 1888, which provided that in proceedings to condemn for the United States the practice, pleadings, forms, and modes of proceedings in cases arising under the provisions of that act shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record in the State within which the district court is held. The district attorney therefore proceeded according to the method prescribed for condemnation proceedings by the Virginia statutes as set out in section 1105f of the Code of 1910 and the succeeding sections. Upon the filing of this petition the plantiffs in error now before the court filed a demurrer, which was overruled by the court below, and thereupon the court ordered that the causes be docketed, and five disinterested freeholders agreed to by the United States and the present plaintiffs in error should be appointed for the purpose of ascertaining and reporting a just compensation under the terms of the Virginia statute. The commissioners appointed made a report to the court, to which report the plantiffs in error excepted, among other grounds, on the ground that the amount assessed for just compensation was not a sufficient, just, or adequate allowance. On the coming in of these exceptions the trial judge below took the testimony that was offered by the Government and the parties, and after hearing the same, on the 9th of August, 1912, made its judgment, adjudging that the reports made in each of the cases made by the commissioners should be confirmed. Before, however, this judgment had been made the plaintiffs in error in the present case had moved the court to impanel a jury to ascertain a proper and just compensation for their lands and to try the issues of fact made up by their exceptions to the commissioners' reports as to what was a just compensation for the land sought to be taken by the Government, which motion was
257 refused by the court in its judgment confirming the report of the commissioners.

It is upon the action of the trial judge below upon this point—as we find no error in his ruling anterior to this motion—that this appeal may be said to turn, viz, whether or not the plaintiffs in

error were entitled to have the question of what damages should be paid them assessed for them for the compulsory taking of their lands through the medium of a jury? It would seem a startling proposition in the first instance to say that, although the Constitution of the United States forbids the United States laying a fine of a few dollars on a defendant without a trial by jury, and although it forbids the United States confining him for an offence committed without the verdict of a jury, and although the Constitution in a common-law case prevents the recovery by one individual from another or by the United States from any citizen of the United States of even a comparatively small amount of money without the verdict of a jury, yet that in a proceeding for condemnation for public purposes property of the value of hundreds of thousands of dollars may be taken without the verdict of a jury.

The question here depends entirely upon the language of the Constitution. There are two statutory provisions of Congress to be found, first in section 566 of the Revised Statutes, which provides that the trial of issues of fact in the district courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy shall be by a jury, and in section 648, which provides that the trial of issues of facts in Circuit Courts shall be by jury except in cases in equity or of admiralty and maritime jurisdiction. These two provisions, however, are statutory and are anterior to the provisions of the act of August 1, 1888, which provides that the practice shall conform to the State practice. By the statutory practice in the State of Virginia trial of the question of damages in condemnation proceedings is not required to be by jury. If, therefore, the right to a trial by a jury in the Federal courts depended
258 upon the statutory provisions in the United States Revised Statutes, they would be repealed by the later statute of 1888, which was also a statutory provision changing the practice of trial of issues of fact in condemnation cases from a trial before a jury to a trial in the method described by the State practice, which might be before commissioners, or at least not before a jury. We are thus cast back to the question whether or not the right of trial by jury in such cases in the Federal courts is constitutional, in which event it could not be changed or done away with by any statutory provision. The constitutional provision is contained in the seventh amendment, which provides that the right to a trial by a jury shall be preserved in suits at common law where the value exceeds twenty dollars.

In Kohl *v.* United States (91 U. S., 367), where the case arose upon proceedings for condemnation instituted by the United States in a court of the United States, the court held (page 376):

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced

through the agency of a jury is immaterial, for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not within the meaning of the statute a suit at common law when initiated in a court."

In this case, however, the question arose upon the right of the Circuit Court of the United States to entertain jurisdiction of proceedings for condemnation, and turned upon the point whether such proceedings were suits at law within the meaning of the statute conferring jurisdiction in such suits upon the Circuit Court. The court states the question (on page 375):

"If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court."

259 All that the court held upon the case made was that it was a suit at common law. There was no question of the parties' right to a trial by jury upon the quantum of the assessment.

In Upshur County v. Rich (135 U. S., 467) the court (on page 476) cites the case of Kohl v. United States as holding that a proceeding for the condemnation of land as a site for a post office is a suit at law, and in Chappell v. United States (160 U. S., 499), on page 413, both the cases of Kohl v. United States and of Upshur County v. Rich are cited as deciding the proposition that a proceeding for condemnation "instituted and concluded in a court of the United States was in substance and effect an action at law."

In United States v. Jones (109 U. S., 513) the court, on page 519, uses this language:

"The proceeding for the ascertainment of the value of the property and consequent compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking, and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate."

But the question of the right to a jury was neither before nor argued before the court. The only question before the court was whether the United States could use a State tribunal for the purpose of condemnation proceedings. The court itself, on page 518, states:

"The only point presented upon which we can pass relates to the jurisdiction of the court below; if that can be sustained, its judgment must be affirmed."

Indeed, it actually appears in the case that a jury was allowed by the statute and actually the judgment below was based upon the verdict of a jury. There was no contention but that the party was entitled to a trial before a jury.

In Chappell v. United States (160 U. S., 499) the right to a trial by jury was not contested. It was a proceeding for condemna-

260 tion filed in the District Court for the District of Maryland

under the act of Congress of August 1, 1888, and the question was whether the party was entitled to two juries. The trial was regularly had before the District Court itself and a special jury of twelve impanelled by the court for the purposes of that particular inquisition. The contention of the party was that he was entitled to a hearing before a special jury and then a trial de novo before another and a regular term jury. The Supreme Court held that the defendant had had the benefit of a trial by an ordinary jury at the bar of the District Court, and was not entitled to a second trial by jury, except at the discretion of the trial court or upon reversal of its judgment for error in law.

In Bauman v. Ross (167 U. S., 548) the case came up in the District of Columbia under the act of Congress of March 2, 1893, providing for the acquisition of ways for highways in the District of Columbia, and which provided for an assessment on a trial before a court and a special jury of seven persons. No question was made or argued in the case that the party was entitled to a jury of twelve men. The argument was principally upon the question of the constitutionality of the act, and the court says, on page 592:

"It was objected to the validity of section 15 that it commits the assessment of benefits upon lands, whether within or without the particular subdivision benefitted by the establishment of a new highway to 'the same jury' which estimates the compensation or damages under the previous sections for taking lands within the subdivision for the purpose of the highway. Some confusion has perhaps arisen from designating the tribunal of seven men which is to estimate the damages and to assess the benefits as 'a jury,' when it is in truth an inquest or commission appointed by the court under authority of the act of Congress, and differing from an ordinary jury in consisting of less than twelve persons and in not being required to act with unanimity." * * *

"By the Constitution of the United States the estimate of the just compensation for property taken for the public use under the right of eminent domain is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the Executive, or to an inquest consisting of more or fewer men than an ordinary jury."

261 This enunciation, if carried to its apparent logical extent, would appear to mean that Congress could, if it saw fit, devolve upon a single individual appointed by the Executive the right and power of depriving an individual of his property, worth, say, thousands of dollars, at an arbitrary valuation, when it could not impose a fine of a small amount without the verdict of a jury of twelve men. The only question for decision before the court in Bauman v. Ross, as appears from the statement in the opinion of the court itself on this point, was whether section 15 of the act was invalid because it committed two different assessments to the same jury. There was nothing either asserted or argued in the case that called for a ruling that no jury of any kind was requisite. The whole confusion on the

subject appears to go back to the statement in Kohl v. United States that the right of eminent domain always was a right at common law and was enforced without the agency of a jury. That it was a right of sovereignty and as such recognized and exercised by the law of England is unquestioned, but it was not a right at common law, understanding by common law the collection of unwritten principles and precedents administered by the judiciary as forming the law governing the relations between Crown and subject and subject and subject. The common law did not include statutes, but only the general customs of the realm contained in the body of its unwritten principles and precedents. (1 Bl. Comm., 62, 63, 64.) It is hardly correct to term a law or a right created by and depending upon a statute as forming a part of the common law. The Crown itself in England possessed no power to expropriate the property of an individual. In Article XLVI of Magna Charta it is declared that no freeman shall be disseized or divested of his freehold or of his liberties or free customs but by the judgment of his peers or by the law of the land, and these rights were made clearer and embodied in the petition of right to Charles I and the Bill of Rights enacted in the first year of William and Mary.

True it left the "attribute of sovereignty," viz, the right to take private property for public use the "law of the land," although
262 not the common law. It could be done and be done only by act of Parliament, i. e., with the threefold concurrence of King, Lords, and Commons, and when done was done by virtue of a statute. Not of the common law. By the constitution of England Parliament was supreme. (1 Black. Comm., 160, 161, 162.) It could do anything. A trial by jury was secured by Magna Charta and the common law, but Parliament could dispense with it. It could and at times did put a man to death, attaint him, and forfeit all his property without any trial whatsoever, but simply by act of Parliament as the law of the land. (4 Black. Comm., 259.) It could therefore take private property for public use without compensation, but there had grown up a system of construction in England so continuous and uniform as to become fundamental law that Parliament would not take private property for private uses nor would it take private property for public uses without just compensation.

1 Black. Comm., 138, 139.

Loan Association v. Topeka, 20 Wall., 662.

Chicago, Burlington R. R. v. Chicago, 166 U. S., 237.

Traction Co. v. Mining Co., 196 U. S., 251, 252.

These two principles were supposed to be embodied in the United States Constitution—the one expressly in the Vth amendment, the other as implied therein. (Loan Association v. Topeka, supra.)

As Parliament had the right to take without compensation if it saw fit, and had the right to do away with jury trial also if it saw fit, it was entirely within its power in statutes providing for the expropriation of private property for public uses if it directed the com-

ensation it saw fit to pay to be ascertained by assessors other than a ury.

A jury was dispensed with in such cases not because at common aw in similar cases a trial by jury could not have been had, but ecause each statute of Parliament providing for an appropriation f private property to public uses was a law unto itself, made for that special occasion, and, being enacted by the supreme power
263 in the land, unhampered by any written constitutional restrictions, it provided in each particular case for the ascertainment f the compensation to be made by such person or persons, commission, or tribunal it saw fit. A good deal of unconsidered language has been used with regard to the method of ascertaining the compensation in such cases prevailing in England and America prior to the adoption of our constitutions.

In the article on Eminent Domain in Vol. 7 of the Ency. of Pl. & Pr., p. 546, it is stated that "a well settled practice existed both in England and in America before the adoption of any of our constitutions of ascertaining the compensation by means of other agencies than a common law jury," and this language is supported by many of the decisions of State courts cited in the note.

But it is entirely erroneous to speak of "a practice" which depended in each case upon the terms of the particular statute, and it is wholly overlooked that anterior to our America written constitutions the conditions in the American Colonies were the same as those in England, i. e., the colonial assembly, with the concurrence of the King's representative, was supreme except where controlled by some express statute or law of the mother country. The local parliaments, including therein the representative of the Crown, had the same powers as the Parliament of England in this regard and could appropriate private property for public use without any compensation, and could therefore allow such compensation as they chose to allow, to be ascertained in any manner they saw fit.

With the advent of written constitutions came a different power of action by the legislative body. The Federal Constitution contains two applicable provisions. The Vth amendment to the United States Constitution prohibits the taking of private property for public uses without just compensation, and the VIIth amendment reserves the right to a jury trial in suits at common law where the value exceeds $20.00. Under these provisions that "attribute of sovereignty," viz, the right to take private property for public uses, which was unlimited as to its exercise by the supreme lawmaking power became now limited in express terms.

264 1. It could be exercised only upon condition that just compensation was paid.

2. If the proceeding to condemn were a suit at common law, the right to a trial by jury was reserved.

As the process of condemnation as practiced since our written constitutions did not exist at common law, the question is really whether this process as now created was not the equivalent of a suit at common

law. The jury at common law was always the tribunal to assess damages. Under the practice in cases of admiralty and equity jurisdiction in England a man might be judicially divested of his property, but not in the way of assessment of damages in common law rights of action. Equity and admiralty dealt with questions of existing rights of property and the relations of litigants to each other, but the assessment of damages for torts committed upon the person or property was at common law the function of a jury. In any case, even in equity and admiralty, the adjudication depriving a suitor of his property or condemning him to pay money to his adversary was rendered only after a hearing before a proper judicial tribunal presided over by a duly qualified judge after testimony taken and argument had, with the administration of justice according to settled judicial principles and the right of appeal to a higher court on questions of fact and law. A different case from a hearing before a special commission or a single individual appointed for the occasion by the Executive.

The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. It is in effect a lawful trespass committed by the sovereign and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party. The analogy to a suit at common law for trespass is close and complete, and it is for that reason, presumably, the Supreme Court of the United States, acting on the definition of a suit at common law previously indicated by it, has decided that a proceeding by the United States to condemn
265 lands for public purposes is a suit at common law. If so it be, then it would follow that the defendant, if he claims it, is entitled at some stage in the proceeding to have his damages assessed by a jury. Could it be reasonably argued that if the Government instituted proceedings to condemn a chattel worth fifty dollars for violation of the custom laws, the owner or claimant is entitled to a trial by jury, or if it seeks to condemn a chattel worth twenty-five dollars for violation of the excise or pure food laws, the owner or claimant is entitled to a trial by jury.

Union Ins. Co. v. United States, 6 Wall., 579;
Henderson Distilled Spirits, 14 Wall., 53;
Garnharts v. United States, 16 Wall., 165;
United States v. Winchester, 99 U. S., 372.

Yet if it proceeds to condemn a piece of land for public purposes worth $50,000.00, the owner or claimant is not entitled to a trial by jury. The only difference in the cases is that in the proceedings to condemn for violation of the law the issue for the jury is the fact of violation, while in the proceeding to condemn for public purposes the issue is the value of the property. But that is the issue in this case. The crime of the owner in the last case is his refusal to accept what the Government offers to pay and his insistence upon a higher value; and as it is the case of a suit at common law he is entitled to have his damages assessed by a jury. The judgment of the District Court of

the United States for the Western District of Virginia is accordingly reversed and the cause remanded for a new trial before a jury.

Reversed.

266

267 March 12, 1913 (same term), the court made and entered the following judgment, to wit:

Judgment.

(Filed and entered March 12, 1913.)

United States Circuit Court of Appeals, Fourth Circuit.

PAUL BEATTY, ALMA JACKSON, ET AL., LUCY E. BARBEE, plaintiffs in error.
vs.
UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1143.

In error to the District Court of the United States for the Western District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court, that the judgment in the said District Court in this cause be, and the same is hereby, reversed; and the cause is remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, with directions to grant a new trial before a jury, in accordance with the opinion of the court filed herein March 12, 1913.

J. C. PRITCHARD.

Petition of defendant in error to stay mandate.

(Filed March 20, 1913.)

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269

PAUL BEATTY, ALMA JACKSON, ET AL., AND LUCY E. Barbee, plaintiffs in error.
versus
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1143.

To the honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

An order having been entered in the above-styled case reversing the judgment of the trial court, your petitioner, the defendant in

error herein, respectfully petitions the court to stay the mandate of this court in this case a sufficient length of time to enable petitioner to apply for and obtain a writ of error and further supersedeas from the Supreme Court of the United States in said case.

Respectfully,

BARNES GILLESPIE,
United States Attorney.

Order staying mandate.

(Filed March 28, 1913.)

United States Circuit Court of Appeals, Fourth Circuit.

PAUL BEATTY, ALMA JACKSON, ET AL., LUCY E. BARBEE, plaintiffs in error.
vs.
UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1143.

Upon the application of the defendant in error, by Barnes Gillespie, United States attorney, and for good cause shown.

It is ordered that the issuance of the mandate of this court in the above case be and the same is hereby stayed 30 days from this date.

March 28th, 1913.

NATHAN GOFF,
Circuit Judge Presiding.

270

271 *Petition for a writ of error.*

(Filed April 18, 1913.)

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN error,
vs.
PAUL BEATTY, ALMA JACKSON, AND Robert H. Jackson, her husband, and Lucy E. Barbee, defendants in error. } Petition for writ of error.

Your petitioner, the United States of America, by Barnes Gillespie, the attorney of the United States for the Western District of Virginia, plaintiff in error in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Fourth Circuit, and that a judgment has therein been rendered on the 11th day of March, 1913, reversing a judgment of the District Court of the United States for

the Western District of Virginia, and remanding the cause to said district court for a new trial, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper cause to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed it in the above-entitled cause,

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273 directing the clerk of the United States Circuit Court of Appeals for the Fourth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

BARNES GILLESPIE,
United States Attorney for the Western District of Virginia, who appears for the petitioner by direction of the Attorney General of the United States.

Order allowing writ of error.

(Filed April 21, 1913.)

Upon the foregoing petition and assignment of errors attached it is ordered that a writ of error issue as prayed for in the petition.
April 21st, 1913.

J. C. PRITCHARD,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

Assignment of errors.

(Filed April 18, 1913.)

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
PAUL BEATTY, ALMA JACKSON, AND ROBERT H. JACKSON, her husband, and Lucy E. Barbee, defendants in error.

275 And now comes the plaintiff in error, United States of America, by Barnes Gillespie, United States attorney for the western district of Virginia, and says that in the record and proceedings

aforesaid of said United States Circuit Court of Appeals for the Fourth Circuit, in a cause therein pending between said parties, and in the rendition of the final judgment therein manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

First. Said circuit court of appeals erred in entering judgment reversing the judgment of the District Court of the United States for the Western District of Virginia, entered on August 9, 1912, and in remanding said cause to said district court for a new trial.

Second. Said circuit court of appeals erred in not entering judgment affirming the judgment of the District Court of the United States for the Western District of Virginia, aforesaid, entered on August 9, 1912.

Third. Said circuit court of appeals erred in sustaining the fourth assignment of error upon the record in said cause filed by said defendants in error to the rulings of said district court, which is as follows:

"The court erred in not granting their motion at Charlottesville on July 1st, 1912, to impanel a jury to ascertain what was a proper and just compensation for the lands sought to be taken by the United States Government for the purposes set out in the proceedings, the statutes of the United States giving them that right."

Fourth. The said circuit court of appeals erred in sustaining the fifth assignment of error upon the record in said case filed by said defendants in error to the rulings of said district court, which is as follows:

"The court erred in not granting the defendants' motion, made at Charlottesville on July 1st, 1912, to impanel a jury to try

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277 the issues of fact made by the exceptions to the commissioners' report as to what was a just compensation for the purposes set out in the proceedings."

Fifth. The said circuit court of appeals erred in holding that the seventh amendment of the Constitution of the United States requires that the amount of compensation to be paid to the said defendants in error for the lands of said defendants in error taken by the plaintiff in error in said case should be submitted to and determined by a jury.

Sixth. Even if it should be held that the seventh amendment of the Constitution of the United States, or any act of Congress of the United States, gave to the defendants in error the right to a trial by jury to determine the amount of compensation to which they were entitled for their lands taken in this cause, they waived that right by being present in court, by counsel, on January 6, 1912, when the district court appointed five disinterested freeholders residing in the county in which said land lies, to ascertain, determine, and report the compensation to which said landowners were entitled, without objecting to said compensation being ascertained in that way and by agreeing thereto, and without requesting at that time that the amount of compensation be submitted to and determined by a jury, and said circuit court of appeals erred in not so holding.

Seventh. Said circuit court of appeals erred in rendering judgment against plaintiff in error in favor of said defendants in error for costs of suit in said circuit court of appeals.

Wherefore the said United States of America, plaintiff in error, by Barnes Gillespie, United States attorney for said western district of Virginia, prays that for the errors aforesaid and other er-

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279 rors appearing in the record of said United States Circuit Court of Appeals, in the above-entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said judgment of the said District Court of the United States for the Western District of Virginia, entered on August 9, 1912, be affirmed, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

BARNES GILLESPIE,
United States Attorney for the Western District of Virginia.

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281 *Writ of error.*

(Issued April 21, 1913.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeale before you, or some of you, between the United States of America, plaintiff in error, and Paul Beatty, Alma Jackson and Robert H. Jackson, her husband, and Lucy E. Barbee, defendants in error, a manifest error has happened to the great damage of the said plaintiff in error, as by its complaint appears, we being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 21st day April, in the year of our Lord nineteen hundred and thirteen.

[SEAL.] HENRY T. MELONEY,
Clerk of the United States Circuit Court of Appeals, Fourth Circuit.

Allowed by J. Pritchard, circuit judge.

282 The foregoing writ of error is served by lodging a copy thereof for the adverse parties in the clerk's office of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, where the record remains, on the 21st day of April, 1913.

Attest:

HENRY T. MELONEY, *Clerk.*

283 *Citation.*

(Issued April 21, 1913.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Paul Beatty, Alma Jackson and Robert H. Jackson, her husband, and Lucy E. Barbee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, wherein the United States of America is the defendant in error, and you are the plaintiffs in error, to show cause, if any there be, why the judgment rendered against the defendant in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 21st day of April, in the year of our Lord, one thousand nine hundred and thirteen.

J. C. PRITCHARD,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

Legal service of the above citation admitted this 12 day of May, 1913.

O'FLAHERTY, FULTON & BYRD,
Attorney for Paul Beatty, Alma Jackson and Robert H. Jackson, her husband, and Lucy E. Barbee.

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285 And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States—and the same is transmitted accordingly.

Teste:

HENRY T. MELONEY, *Clerk.*

Clerk's certificate.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 12th day of May, A. D. 1913.

[SEAL.] HENRY T. MELONEY,

Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

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(Indorsement on cover:) File No., 23694. U. S. Circuit Court Appeals, 4th Circuit. Term No., 555. The United States of America, plantiff in error, vs. Paul Beatty, Alma Jackson and Robert H. Jackson, her husband, and Lucy E. Barbee. Filed May 15th, 1913. File No., 23694.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 555.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

PAUL BEATTY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES. FOURTH CIRCUIT.

MOTION BY THE DEFENDANTS IN ERROR TO ADVANCE.

On behalf of the defendants in error and by consent of the Solicitor General, the attorney for the defendants in error herein moves the court to advance the above-entitled cause for oral argument.

The appeal herein grows out of certain condemnation proceedings on the part of the United States in the District Court of the United States for the Western District of Vir-

ginia to condemn lands in the county of Warren, State of Virginia, for the purpose of raising and caring for horses for the mounted service of the Government by virtue of the act approved March 3, 1911, as set forth. Commissioners were appointed by said court to ascertain proper and just compensation for the land sought to be taken. A judgment was entered upon the report of the Commissioners, from which the case was appealed to the United States Court of Appeals, 4th Circuit, on the ground, among others—

> "That it erred in not granting the motion of the defendant landowners made at Charlottesville on July 1, 1912, to impanel a jury to ascertain what was a proper and just compensation for the land sought to be taken, or to impanel a jury to try the issues of fact made up by the exceptions to the Commissioner's report as to what was a just compensation for the land sought to be taken by the Government."

The said United States Circuit Court of Appeals reversed the judgment of said district court and held that the landowners herein were entitled under the provisions of the Constitution of the United States thereto appertaining to have a common-law jury ascertain and fix compensation for the land sought to be taken. From this action of said Circuit Court of Appeals the United States has prosecuted the appeal herein.

The delay incident upon an appeal of this character constitutes a great hardship upon the defendants in error, whose land has been in possession of the Government for the purpose herein since the action of the said district court, and some of the defendants in error have thereby been deprived of the income of this property, which constitutes their only means of support, and will continue to be deprived thereof until this case is disposed of by this honorable court.

While it is true the money awarded by the Commissioners for their land has been deposited with the clerk of said district court at Lynchburg, Va., yet they are deprived of any interest thereon, or intervening damages, as well as any

costs in the event they are finally successful in this court.

The United States is interested in an early hearing of the issues herein for the reason that similar condemnation proceedings are in progress in various parts of the country, where damages have or will be fixed by Commissioners as in the case at bar. The early determination of the main question herein, therefore, is considered of much importance to the United States in view of the fact that the particular question involved in the principal error assigned by the Government has not yet been presented to this court for its determination.

E. HILTON JACKSON,
Attorney for Defendants in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PAUL BEATTY ET AL. } No. 555.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit in the above-entitled cause.

This case is now pending in this court on writ of error sued out by the United States to review the judgment of the Circuit Court of Appeals for

the Fourth Circuit, and has been advanced and assigned for argument on January 5 next. This petition for a writ of certiorari is filed out of abundant caution, in case this court should be of the opinion that the judgment of the court below was not final, and that therefore the proceedings in error were prematurely brought.

QUESTION INVOLVED.

The main question involved in the case is whether an inquest to determine compensation in a condemnation proceeding taken pursuant to the act of Congress of August 1, 1888, 25 Stat. 357, by commissioners according to the procedure required by a State statute which does not provide a jury trial is contrary to the Seventh Amendment of the Constitution of the United States.

STATEMENT OF THE CASE.

The Army appropriation act approved March 3, 1911, 36 Stat. 1037, 1049, appropriated "not to exceed two hundred thousand dollars for the purchase of land accessible to the horse-raising section of the State of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service." Pursuant to this authority, and by virtue of the act of August 1, 1888, 25 Stat. 357, the United States filed a petition (R. 8, 9) in the District Court of the United States for the Western District of Virginia stating the determination of

the proper Government official that the land of the defendants in error was necessary for the purposes of the said act of March 3, 1911, filing as an exhibit a description of the lands, and praying for an appointment of commissioners, in accordance with the statutes of Virginia, to ascertain the just compensation to be paid for said lands.

Thereupon, "by agreement of the parties" (R. 15), the court appointed five commissioners to ascertain the just compensation to be paid for the lands. On the coming in of the commissioners' report, the defendants in error filed exceptions thereto (R. 26–28), and at the hearing of said exceptions the defendants in error, by motion in open court (R. 39), raised for the first time the point that a jury must be impaneled, either to try the matter *de novo* (R., 39, Par. IV), or to try their exceptions to the commissioners' report (*ib.*, Par. V). The District Court overruled the motion and the exceptions, and confirmed the report. (R. 142, 143.)

On writ of error from the Circuit Court of Appeals, that court, sustaining the court below in all other respects (R. 147), held that the act of August 1, 1888, *supra*, was contrary to the Seventh Amendment to the Constitution of the United States in so far as it authorized condemnation proceedings according to a State practice which provided for ascertaining by other means than a common-law jury the compensation to be paid for lands taken.

(R. 147–155.) The judgment of the court was (R. 155)—

> that the judgment in the said district court in this cause be, and the same is hereby, reversed; and the cause is remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, with directions to grant a new trial before a jury, in accordance with the opinion of the court filed herein.

From this judgment of the Circuit Court of Appeals the United States sued out a writ of error, as stated above, which proceeding in error is No. 555 on the docket for the present term.

GENERAL REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

It is submitted that the judgment below is final in substance if not in form. It holds, in effect, that the only statute which authorizes the Government to proceed at all in this case, namely, the act of August 1, 1888, is unconstitutional in its application. It is impossible for the Government to comply with the order of the court to proceed *de novo* before a jury, because there is no statute of the United States authorizing any such procedure. The only authority of law conferred by Congress is to proceed by a practice conforming as near as may be to the practice of the State where the land lies, and the only practice provided for by

the statutes of Virginia, where the land in question lies, is an inquest by five commissioners.

If, however, this court should be of a different opinion, and should hold that the judgment below, on account of its form, is not final so as to vest jurisdiction in this court on writ of error, it is submitted that a writ of certiorari should issue so that the case may be properly before the court. The matter is one of great importance to the public interests, since the decision of the court below nullifies the practice which has obtained generally in Government condemnation proceedings for many years, and, perhaps, throws a cloud upon titles acquired thereunder. To comply with the mandate of the Circuit Court of Appeals would cause the greatest confusion in the proceedings, even if it were possible for the Government to comply with it at all. If the case is to be heard before a jury, it is necessary that the report of the commissioners should be set aside entirely, as though never rendered. If a trial by a jury were then had and a verdict rendered with judgment thereon, and that judgment were brought finally to this court, and this court were of the opinion that the decision of the Circuit Court of Appeals was wrong, and that no jury trial should have been had, it is doubtful whether this court could then affirm the prior report of the commissioners, and doubtful therefore whether the whole proceeding would not have to be begun over again before commissioners under the

Virginia practice. The interests of all parties evidently require a disposition, at the present stage of the cause, of the questions of law involved.

Respectfully submitted.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1913.

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So, too, the State courts are practically unanimous in holding that a constitutional provision preserving the right of trial by jury does not apply to condemnation proceedings. 18

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
PAUL BEATTY ET AL. } No. 555.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to review the judgment of the Circuit Court of Appeals for the Fourth Circuit in a proceeding to condemn lands for the use of the United States.

The Army Appropriation Act approved March 3, 1911, 36 Stat. 1037, 1049, appropriated "not to exceed two hundred thousand dollars for the purchase of land accessible to the horse-raising section of the State of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service." Pursuant to this authority, and by virtue of the act of August 1, 1888, 25 Stat. 357, the United

States filed a petition (R. 8, 9) in the District Court of the United States for the Western District of Virginia stating the determination of the proper Government official that the land of the defendants in error was necessary for the purposes of the said act of March 3, 1911, filing as an exhibit a description of the lands and praying, in accordance with the statutes of Virginia, for the appointment of commissioners to ascertain the just compensation to be paid for said lands.

A demurrer was interposed (R. 11, 12), on the ground that there was no statute of the United States authorizing the proceedings, and that the court was without jurisdiction. This demurrer was overruled (R. 13).

Thereupon " by agreement of the parties " (R. 15), the court appointed five commissioners to ascertain the just compensation to be paid for the lands. On the coming in of the commissioners' report, the defendants in error filed exceptions thereto (R. 26–28), and at the hearing of said exceptions, the defendants in error, by motion in open court (R. 39), raised for the first time the point that a jury must be impaneled, either to try the matter *de novo* (R. 39, par. IV), or to try their exceptions to the commissioners' report (*ib.*, par. V). The District Court overruled the motion and the exceptions, and confirmed the report (R. 141–143).

Upon writ of error to this judgment the Circuit Court of Appeals held that a proceeding to condemn lands is a suit at common law within the

meaning of the Seventh Amendment to the Constitution, as to which a trial by jury is preserved; and that the act of August 1, 1888, 25 Stat. 357 (Appendix A, p. 22), would not warrant a denial of this right in proceedings instituted to condemn lands situate in the State of Virginia.

The judgment of the court was (R. 155)—

> * * * that the judgment in the said District Court in this cause be, and the same is hereby, reversed; and the cause is remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, with directions to grant a new trial before a jury, in accordance with the opinion of the court filed herein.

For the convenience of the court we print as Appendices the act of August 1, 1888, *supra*, and so much of the statutes of Virginia as relate to the procedure in condemnation cases.

ASSIGNMENTS OF ERROR.

The assignments of error, which are seven in number, may be compressed within the limits of two propositions:

1. The Circuit Court of Appeals erred in holding that the appellees were entitled as a constitutional right to a trial by a common-law jury on the question of compensation.

2. The Circuit Court of Appeals erred in holding that the appellees had not waived their right, if any they had, to such jury trial.

ARGUMENT.

I.

The judgment of the Circuit Court of Appeals was final in character.

It is admitted that the judgment is not final in form. It is so, however, in substance, and effectually disposes of the whole case. The only statute under which the Government is authorized to proceed at all, namely, the act of August 1, 1888, requires that the proceedings shall conform as near as may be to those existing in the courts of record in the State of Virginia, which makes no provision whatever in its statutes for the impaneling of a jury in such cases. The judgment of the Circuit Court of Appeals unreversed is of course a bar to the consummation of the proceeding in the manner provided by the Virginia statutes. To comply with the mandate of the court will require the Government to abandon entirely the report of the commissioners and to proceed before a jury. If this court should upon subsequent review be of the opinion that such a proceeding was without warrant of law, it is doubtful at least whether the prior report could then be confirmed and whether the Government would not be put to a proceeding *de novo*.

In this aspect there is some analogy to the case of *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S. 287, 290, where this court intimates that a judgment de-

termining the right to condemn might be treated as final, the proceedings to determine the compensation being distinct.

If, however, the court should be of the opinion that the judgment below is not final, it is respectfully submitted that the case should be determined on writ of certiorari, for which the Government has applied. It is not only important to the parties that there should be an end to the present litigation, but the question is manifestly of great importance to the public interests and one which may, and no doubt will, arise frequently in the future.

II.

The Seventh Amendment to the Constitution of the United States does not apply to inquests of damages in condemnation proceedings.

This amendment merely provides that "the *right* of trial by jury shall be *preserved*" "in *suits at common law.*" It is submitted (1) that a proceeding merely to ascertain the just compensation to be paid by the sovereign for land taken for public uses is not a "suit at common law," and (2) that even if it be such a suit, by usage established long before the adoption of the Constitution (and since continued), a common-law jury has not been deemed necessary in it, so that there is no "right" to such a jury to be "preserved." The finding of the court below to the contrary stands practically alone.

1. The right of eminent domain is based on public necessity and is paramount in its nature. It is a sovereign, not an adversary, right. In the absence of constitutional restriction, it could be exercised in any way the sovereign saw fit, and with or without compensation. The right to compensation, formerly moral only, but now legal by virtue of constitutional provisions, is not adversary to, or connected with, the right to take land for public uses. It is not a set-off against the right to take, nor does it arise out of any implied or quasi contract, or delict. A proceeding to condemn, therefore, is nothing more than an inquiry by the sovereign, through the medium of some impartial body, as to the compensation he should justly make on account of the exercise of his sovereign right. It therefore bears no analogy to an issue of fact which must be determined by a common-law jury. It is true that in *Kohl* v. *United States,* 91 U. S. 367, this court held that where the United States instituted formal proceedings as plaintiff against certain defendants to condemn their property, it was a *" suit at law "* within the meaning of the act conferring jurisdiction on the Circuit Court of the United States. The court said (p. 375):

> * * * If, then, a proceeding to take land for public uses by condemnation *may be* a suit at common law, jurisdiction of it is vested in the Circuit Court." (Italics ours.)

And again (p. 376):

> * * * The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, *when initiated in a court.* * * * (Italics ours).

But in the subsequent case of *Boom Co.* v. *Patterson,* 98 U. S. 403, 406, this court, while holding that where the inquiry takes the form of a proceeding before the court between parties, it is a civil suit, said:

> The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms.

And in *Upshur County* v. *Rich,* 135 U. S. 467, 475, the court said of condemnation proceedings:

> * * * The general rule with regard to cases of this sort is, that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and

> a litigation is there instituted between parties, then it becomes a suit within the meaning of this act of Congress";

and *Kohl* v. *United States, supra,* is explained on this ground.

In the present case there was nothing in the nature of a litigation in court *inter partes,* nor do the statutes of Virginia contemplate such a litigation. There was merely a petition for the appointment of commissioners to ascertain the just compensation. Such a proceeding, it is submitted, can not be considered a suit at common law.

2. But even if it be held to be such a suit, it is, nevertheless, as said by this court in *Kohl* v. *United States, supra,* one in which, by long-established usage, there was no "right" to a trial by a common-law jury. The writ of *ad quod damnum* was sometimes applied to it in England pursuant to which a jury was summoned, but this jury must have been one of inquest merely, and not of trial. Generally Parliament seems to have fixed the procedure by special acts, and these often merely provided for commissioners. In this country the writ of *ad quod damnum* appears to have been used rarely, if ever, and from early times the compensation was ascertained by commissioners. In *Bonaparte* v. *Railroad Company,* 1 Baldwin, C. C., 205, 221, Judge Baldwin, in 1830, said of the practice in New Jersey—

> the appointment of commissioners was usual from a very early period * * *; it has

> been continued to the present time, and held by the late learned chancellor of the state to be constitutional.

He therefore sustained the proceedings, though the constitution of New Jersey provided that the right to trial by jury should be preserved inviolate.

In *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 722, 723, Chancellor Vroom traces the practice in New Jersey back to 1681. In *Beekman* v. *R. R. Co.*, 3 Paige, 45, 75, Chancellor Walworth makes similar observations as to the practice in New York, and approves that practice, though the Constitution of New York provided that the right of trial by jury should remain inviolate, and he repeats these views in *Livingston* v. *New York*, 8 Wend. 85, 102. In *Backus* v. *Lebanon*, 11 N. H. 19, 26, 27, Chief Justice Parker gives instances of the appointment of commissioners in Massachusetts and New Hampshire as far back as 1639 and concludes:

> * * * It had, therefore, been "otherwise used and practised," for nearly a century and a half before the adoption of the constitution; and a similar use and practice has prevailed from that period up to the present time. The case is not only within the express language of the exception, but there is, from these circumstances, abundant evidence that it must have been within the view of the framers of that instrument.

In *R. R. Co.* v. *Davis*, 2 Dev. & Bat. Law, 451, 465, 466, 467, Chief Justice Ruffin in a very able opinion

states that the early practice in North Carolina was to proceed by commissioners, and holds that on that account the constitutional provision as to trial by jury did not apply. In *R. R. Co.* v. *Baltzell*, 75 Md. 94, 107, the court states that "from the earliest colonial history" condemnation proceedings had been by way of a special jury of inquest. In *Willyard* v. *Hamilton*, 7 Ohio, pt. 2, 111, 115, 116, the court said:

> * * * But it is said that the right of trial by jury is violated by the appointment of commissioners. This is an objection which I have heard repeated ever since my earliest recollection of such matters; and yet it has always been made with that degree of hesitation which denotes that the objector is not altogether sure of the ground on which he stands. It has been constantly made in the progress of every public improvement which has been executed in the United States; and yet every one seemed to feel that although it was striking and plausible, yet that it could not possibly be maintained. The constitution declares that the right of trial by jury shall be inviolate; and the only way in which we can ascertain the true meaning of this clause, is by making inquiry whether, before the constitution was framed, jury trial was known in such cases in the territory of Ohio. And one of the first acts, which I recollect, is that of 13th December, 1799, by which *five* commissioners are authorized to take the land of private individuals, where the public con-

> venience requires that a road should be conducted over it, and declaring that any *three* of the five may agree in the assessment of damages to the owners.

And the court concludes:

> * * * Perhaps there is no constitutional question which has ever been discussed in this country, which has been so completely settled by contemporaneous construction and universal acquiescence.

It has been decided or assumed in many cases in this and the inferior Federal courts that the constitutional provisions as to trial by jury do not apply to an inquisition in condemnation cases. In *Custiss* v. *Turnpike Company,* 6 Cranch, 233, decided in 1810, the court held that an inquisition taken under the authority of the act of Congress of March 3, 1809, 2 Stat. 539, 541, which provided for a jury of 24 persons who should meet on the premises to value the property, and whose award should be final, could not be quashed by the Circuit Court for the District of Columbia because, as said by Chief Justice Marshall (p. 237):

> The law asks not the intervention of the court, and requires no exercise of judicial functions.

In *Livingston's Lessee* v. *Moore,* 7 Pet. 469, 551, in holding that an act appointing commissioners to sell lands on which the State had a lien was not in violation of the provision of the State

constitution securing the right to trial by jury, the court used the following language:

> * * * we are well satisfied that there is no more reason for extending the provision of the amendment to that inquest, than there would be to the inquest of a coroner, or any other mere inquest of office. The word *trial,* used in the sixth section, clearly points to a different object; and the distinction between trial by jury and inquest of office, is so familiar to every mind, as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former. The one appertains to a mere remedy for the recovery of money, which may be altered at any time without any danger to private security; the other is justly regarded in every state in the Union, as among the most inestimable privileges of a freeman.

In *West River Bridge Company* v. *Dix,* 6 How. 507, 549, Justice Woodbury in his concurring opinion said:

> Nor on the face of the record do the proceedings seem void, because the assessment may have been without a jury, when it was made by the legal officers, appointed for that purpose.

In *Secombe* v. *Railroad Company,* 23 Wall. 108, 117, 118, the court said:

> It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any

> provision in the organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken.

In *United States* v. *Jones*, 109 U. S. 513, 519, this court held that the United States in ascertaining the amount of damage caused by the construction of certain public works could proceed by a commission appointed under a special act of Wisconsin, and in answering an objection that this permitted the State to control the exercise of sovereign Federal functions, said:

> The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion.

In *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 340, the condemnation proceedings were conducted under a statute of the United States which provided that the procedure should conform, as nearly as might be, to the practice of the State. The assessment was made by commissioners in accordance with the New Jersey law, and it is assumed throughout the opinion that this method was unobjectionable, Justice Gray saying:

> * * * The award of the commissioners so appointed must be filed and recorded somewhere, in order to preserve the proof of *the rights* of both parties under it. (Italics ours.)

In *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 694, 695, the court said:

> Neither can it be said that there was not "due process of law" in these condemnation proceedings. It is not essential that the assessment of damages be made by a jury. Such award may be made by commissioners, at least where there is provision for a review of their proceedings in the courts. *Central Branch Union Pacific Railroad* v. *Atchison, Topeka & Santa Fe Railroad*, 28 Kansas, 453, 463; Cooley on Const. Lim. 563.

In *Bauman* v. *Ross*, 167 U. S. 548, 592, 593, the court, in sustaining certain assessment proceedings in the District of Columbia, said:

> It was objected to the validity of section 15, that it commits the assessment of benefits upon lands, whether within or without

the particular subdivision, benefited by the establishment of a new highway, to "the same jury" which estimates the compensation or damages, under the previous sections, for taking lands within the subdivision for the purpose of the highway. Some confusion has perhaps arisen from designating the tribunal of seven men, which is to estimate the damages and to assess the benefits, as "a jury," when it is in truth an inquest or commission, appointed by the court under authority of the act of Congress, and differing from an ordinary jury in consisting of less than twelve persons, and in not being required to act with unanimity. *American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 474.

By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. *Custiss* v. *Georgetown & Alexandria Turnpike Co.*, 6 Cranch, 233; *Secombe* v. *Railroad Co.*, 23 Wall. 108, 117, 118; *United States* v. *Jones*, 109 U. S. 513, 519; *Shoemaker* v. *United States*, 147 U. S. 282, 300, 301; *Long Island Co.* v. *Brooklyn*, 166 U. S. 685.

In *Capital Traction Company* v. *Hof*, 174 U. S. 1, 43, this court upheld the constitutionality of a

statute enlarging the civil jurisdiction of Justices of the Peace in the District of Columbia, and granting a jury trial only on appeal and filing appeal bond, largely for the reason that such statutes were customary in the States and had been upheld by the State courts. Much of the reasoning in that opinion is applicable to the case at bar.

It is claimed, however, that the case of *Chappell* v. *United States,* 160 U. S. 499, is a decision that a common-law jury is necessary in condemnation cases in the United States courts. We do not so understand that authority. It dealt with a petition for condemnation under the same act—August 1, 1888—by virtue of which the proceedings in the case at bar were brought, except that in the *Chappell* case the Maryland law provided for a special jury, while in the case at bar the Virginia law provided for commissioners. This court, in the *Chappell* case, merely decided that a proceeding in the United States courts "as near as may be" to the Maryland procedure would be a common law jury under section 566, or 648 R. S., and that therefore Chappell had had a trial before such a jury. That the case can not be taken as deciding that an inquest by commissioners according to the State practice is violative of the Seventh Amendment, is shown by the remarks of Mr. Justice Gray in the subsequent case of *Bauman* v. *Ross,* quoted above. That learned and accurate jurist could not have used such language if his previous decision in

Chappell v. *United States* were susceptible of the construction placed on it by defendants in error.

It may be that not all of the cases above referred to directly adjudicate the question at bar. Nevertheless, these cases and others which might be cited disclose a contemporaneous and continuous construction of the constitutional provisions as to trial by jury in their application to inquests in condemnation proceedings, and an outspoken or tacit approval of procedure by the medium of commissioners which can not be lightly disregarded. As said by this court in *Stuart* v. *Laird,* 1 Cranch, 299, 309, in answer to the claim that judges of this court could not sit as Circuit Judges:

> * * * it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

In the lower Federal courts the precise point made in this case as to the Seventh Amendment has been ruled adversely to the contention of dedendants in error by Judge Morris in *Great Falls Manufacturing Co.* v. *Garland,* 25 Fed. 521, 524, 525, and by Judge Benedict in *United States* v.

Engerman, 46 Fed. 176. (And see the opinion of the Circuit Court of Appeals for the Sixth Circuit delivered by Judge Lurton in *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320–325.) In other cases the procedure by commissioners has been inferentially approved, *e. g.*, *In re Secretary of the Treasury*, 45 Fed. 396; *Carlisle* v. *Cooper*, 64 Fed. 472; *United States* v. *Bartlett*, 172 Fed. 683.

The State courts are, so far as we can discover, unanimous in holding that a constitutional provision preserving the right to trial by jury does not apply to condemnation proceedings. In *Capital Traction Co.* v. *Hof, supra*, this court said page 23:

> * * * In passing upon these questions, the judicial decisions and the settled practice in the several States are entitled to great weight, inasmuch as the constitutions of all of them had secured the right of trial by jury in civil actions, by the words "shall be preserved," or "shall be as heretofore," or "shall remain inviolate," or "shall be held sacred," or by some equivalent expression.

In addition to the State authorities cited above, we may be permitted to refer the court to the following cases, in every one of which there was a provision of the State constitution preserving the right to trial by jury; the point was squarely raised, and in a considered judgment overruled.

Johnson v. *Railroad Co.*, 23 Ill. 202, 207, 208;

Railroad Co. v. *Railroad Co.*, 28 Kans. 453, 456, 461;

Ingram v. *Water Co.*, 98 Me. 566, 573;
Railroad Co. v. *Ferris*, 26 Tex. 588, 599;
Anderson v. *Caldwell*, 91 Ind. 451;
State v. *Jones*, 139 N. C. 613, 618, 619;
Oliver v. *Railroad Co.*, 83 Ga. 257, 261, 262;
Railroad Co. v. *Trout*, 32 Ark. 17, 24–28;
Heyneman v. *Blake*, 19 Cal. 579, 596, 597;
Kendall v. *Post*, 8 Ore. 141, 146.

See also 2 Lewis Em. Domain, section 509 (3d edition), and cases cited.

III.

The right to a trial by jury, if it exist, was waived by defendants in error.

There can be no dispute that the *right* to a trial by jury in *civil* actions, preserved by the Seventh Amendment, may be waived. Congress by sections 649 and 700 of the Revised Statutes has provided a special procedure for such a waiver which has never been questioned, so far as we are aware. In *Kearny* v. *Case*, 12 Wall. 275, 284, the court said:

> "This cause came up for trial; J. D. Rouse and Elmer and King for plaintiffs; G. L. Bright and Bradford, Lea, and Finley, for defendants; when, after hearing the pleadings, evidence, and argument, the court considering the same, it is ordered, adjudged, and decreed," &c.

Is this court at liberty to infer from the entry a waiver of the right to a jury trial? When we consider the cases already cited,

> in which such a waiver has been implied, and that the right to have a jury when a party demands it is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver. But we are not prepared to go further.

See also *Perego* v. *Dodge,* 163 U. S. 160, 166.

In the case at bar, after demurrers which did not seek to raise the point as to the Seventh Amendment had been overruled, the order appointing the commissioners (R. 13–15) reciting that the parties had appeared by their attorneys, directed that the cause be docketed and " by agreement of the parties " appointed five commissioners. When the commissioners had rendered their report, the defendants in error filed exceptions thereto (R. 26–28), none of which raised any objection to the procedure by way of commissioners, and it was not until the argument on the exceptions that the defendants in error for the first time moved to impanel a jury (R. 39). Surely it was then too late to raise the objection. The defendants in error could not blow hot and cold. They could not participate in the proceedings by way of commission and then accept the report if it proved satisfactory, or demand a jury if it proved otherwise. They produced

their witnesses before the commission and heard the witnesses for the Government, and it would be the height of injustice, after such voluntary participation in the proceedings, to permit them to compel the Government to take the whole matter up again from the beginning.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

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DECEMBER, 1913.

APPENDIX A.

Act of August 1, 1888, 25 Stat. 357, authorizing condemnation of land for sites of public buildings, and for other purposes.

(Ante p. 8.)

* * * That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

SEC. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

APPENDIX B.

Statutes of Virginia relating to procedure in condemnation cases—section 1105f, Pollard's Virginia Code, Annotated, 1904, ch. 46B, EMINENT DOMAIN.[1]

(Ante p. 3.)

(1) *Construction of the word "railroad."* * * *

(2) *Jurisdiction of the power to condemn land.* * * *

(3) *Entry for the purpose of examining and surveying land; liability for injury or trespassing.* * * *

(4) *Appointment of commissioners in case of disagreement; plat of survey, &c., to be filed on application for appointment.* Any company heretofore or hereafter chartered by this State, which is authorized by its charter or the laws of this State to condemn land or other property, or any interest or estate therein, for its uses, which cannot, because of the incapacity of the owner, or any one of them, or inability to agree upon the price or terms, or because the owner cannot, with reasonable diligence, be found in this State, or is unknown, agree on terms of purchase with those entitled to any land, or other property, or an interest

[1] Sections 4, 5, 6, 9, 14, and 27 were amended by the act of March 15, 1906 (Va. Acts of Assembly, 1906, p. 452), and are shown in the amended form.

Section 3 was amended by the act of March 12, 1912 (Va. Acts of Assembly, 1912, p. 395), and section 25 by the acts of March 15, 1906, *supra*, and the act of March 11, 1912 (Va. Acts of Assembly, 1912, p. 214).

or estate therein, wanted to be taken and used in the construction, maintenance, operation, improvement, or straightening of its line, or works, or change of location of its line or works, or in constructing or providing additional facilities, or for other necessary purposes of such company, desiring to condemn any land, or other property, any interest or estate therein, for any of its uses or purposes aforesaid, or entitled to damages to property by reason of the doing of such work or the making of such improvements, where no property is taken, shall, before making application for the appointment of commissioners as hereinafter provided, file in the clerk's office of the proper court, as defined in section two of this act, a petition for the appointment of commissioners as hereinafter provided, which shall be signed by the president, vice president, general manager or general superintendent of such company, and shall set forth the interest and estate intended to be taken in the land or other property, or the damages to any person likely to arise by reason of the doing of such work or making of the proposed improvement, and the material facts upon which the application for the appointment of commissioners is based, and especially the fact that the land or other property, or interest or estate therein sought to be condemned is wanted for the use and purposes of the company, or where no property will be taken for such uses and purposes, but property will be damaged, the necessity for the work of improvement which will cause, or is likely to cause, damage to the property or estate of any person, with which petition shall be filed a plat of the survey, with a profile showing the cuts and fills, trestles and bridges, and a description of the land

or any other property which, or an interest or estate in which, is sought to be condemned, or damaged, and if known to such company, a memorandum showing the names and residents of the owner or owners of such land or other property; and if more than one parcel of land or property, or an interest or estate therein, a plat of the survey and a description of each, with profile, as aforesaid, and if known to such company the names and residences of the owners of each, and showing also the quantity of land or other property which, or an interest or estate in which, is sought to be condemned, or will be, or is likely to be damaged.

(5) *Application for the appointment of commissioners; notice.* Upon complying with the requirements of the preceding section, any such corporation may give ten days' notice of its intention to apply to the proper court, as defined in section two of this act, for the appointment of commissioners to ascertain what will be just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works, which notice shall be served on the tenant of the freehold, or his guardian, or committee, or if it shall appear by affidavit or by the averment of the petition that such tenant, guardian, or committee is a nonresident of the State, or if there be no such tenant, guardian, or committee within this State, or if such tenant, guardian, or committee cannot, with reasonable dili-

gence, be found, or is unknown, such notice, instead of being served, may be by order of publication and posting, as prescribed by law. But where the notice to the tenant, guardian, or committee is so served, the notice to other parties whom it may concern shall be published once a week for two successive weeks in a newspaper published in the city or county wherein the land or property which, or an interest or estate in which, is proposed to be condemned or damaged is located, and by posting the same at the front door of the courthouse of said city or county ten days previous to such application; or, if no newspaper be published in said city or county, then such notice shall be posted as hereinbefore prescribed, and shall be published in some other convenient newspaper in this State, to be designated in term time, or in vacation, by the judge of the court to which such application is to be made.

(6) *Appointment of commissioners; their duties; court to designate time of meeting; adjournment; pay of commissioners.* Upon its appearing that such notice has been given that such company has complied with the provisions of section four of this act, and that the land or other property, or the interest or estate therein sought to be condemned is wanted for the uses and purposes of such company, or that property will be damaged, or is likely to be damaged, by the doing of such work or making of such improvement, though no property or estate be actually taken, the court of the county or city in which the said land or other property, or a greater part thereof, lies, shall appoint five disinterested freeholders, residing in such county or city, any three or more of whom may act, for the purpose of

ascertaining a just compensation for such lands or other property, or for such interest or estate therein, and awarding the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works; and in the order appointing such commissioners, the court shall designate the day and hour for them to meet, which order shall operate as notice of such meeting to all parties in interest. Any one or more of said commissioners attending on the land, or other property, may adjourn from time to time until the business shall be finished. The said commissioners having viewed the land or other property, may, from time to time, adjourn to such other place in the city or county as they may deem expedient, for the purpose of hearing evidence and arguments and conferring about and formulating their report. The said commissioners shall receive three dollars for every day they may be employed in the performance of their duties, which shall be paid by the parties at whose instance they are appointed, unless otherwise ordered by the court.

(7) *Oath of commissioners.* * * *

(8) *Report of commissioners.* * * *

(9) *When report to be returned, confirmed and recorded; to whom compensation for damages may be paid; receipts; acknowledgment and recordation; vesting of rights or property.* The said report, and the certificates of the officer administering the oath, shall be forthwith returned to the clerk's office of such court of the county or city, where it shall remain for at least thirty days, after which, unless

good cause be shown against the report, the same shall be confirmed by the court. The sum so ascertained to be a just compensation, and the measure of damages, if any, may be paid to the persons entitled thereto, or into court, and, when paid to the persons entitled thereto, the receipt for the same, when witnessed by two witnesses or acknowledged before a person duly authorized to take acknowledgments of deeds, together with the report, shall be recorded by the clerk of the court, and both the report and the receipt, when so recorded, duly indexed by the clerk. Upon such payment, either to the person entitled thereto or into court, and confirmation of the report, the title to the part of the land, and to other property for which such compensation is allowed, shall be absolutely vested in the company, in fee simple, except in the case of a turnpike company, where a sufficient right of way only for the purposes of such company shall be vested, and except, also, in the case of any other company where, if the notice of the application to the court shall so specify or describe, and the petition shall so pray, the interest or estate as shall be so specified or described and prayed for, shall be vested. Nothing in this act contained shall be construed as authorizing the condemnation of a less estate in the property taken than is owned by the party against whom the proceeding is.

(10) *When other commissioners may be appointed.* If, however, good cause be shown against the report, or if the commissioners report their disagreement, or if they fail to report within a reasonable time, not to exceed ninety days, the court may, without further notice, as often as seems to it proper, appoint other commissioners, and the matter may be proceeded in as before prescribed.

(11) *When company may begin work during pendency of proceedings; no injunction to be awarded.* * * *

(12) *Judgment of the commissioners on subsequent report; costs, &c.* When, after such payment into court, a report is made which is confirmed, if the sum thereby ascertained exceed what was so paid, the judgment shall be given against the company for the amount of such excess, with legal interest thereon from the date of the award until payment thereof either into court, or to the party entitled thereto; and if what was so paid exceed the sum ascertained by the second report, the excess shall be paid back to the company. If the sum ascertained by the report, which is confirmed, be not more than the sum ascertained by the first report, the party applying for the appointment of other commissioners shall pay the costs occasioned by such application, unless the original report was set aside on some other ground than that of insufficiency of compensation.

(13) *Company to have no right of possession till judgment is satisfied; vesting of title.* The company, when such judgment is rendered against it, shall thereafter have no right to possession of the land until the judgment is satisfied. From the time of such satisfaction by the payment of the money to the person entitled thereto, or into court, or from the time of the confirmation of the subsequent report, if no additional compensation be thereby ascertained, or from the time of the termination of the proceedings, if they be determined without such confirmation, the title of the fee simple in the land, or other property, or to the interests or estate condemned therein, shall be vested in the company.

(14) *Disposition of money, inquiries of commissioners, &c.* After the payment of the amount of compensation and damages into court, as hereinbefore prescribed, the interest or estate of the owners shall terminate, and the interest or estate of such owner or owners shall be vested in the said compensation or damages so paid into court as was vested in such property so taken or damaged, and all liens by a deed of trust, judgment, or otherwise upon said property or estate shall be transferred to such money so paid into court, and the court shall make such distribution of such money as to it may seem right, having due regard to the interests of all persons therein, whether such interest be vested, contingent or otherwise, and to enable the court to make a proper distribution of such money it may, in its discretion, direct inquiries to be taken by a commissioner of the court or by a special commissioner in order to ascertain what persons are entitled to such money, and in what proportions, and may direct what notice shall be given of the making of such inquiries by such commissioner or special commissioner.

(15) *Manner in which commissioners may be appointed; number, duties, vacancies, term of office, compensation, &c.* Instead of having commissioners appointed in the manner prescribed by sections five and six of this act, any such company may apply to the special court of any county, which shall, upon it appearing that such company has complied with the requirements of section four of this act; that notice has been given by publication and posting, as required by section five of this act, and that the land, or the interest or estate therein, and other property, proposed to be taken are necessary

for the uses and purposes of such company, appoint five disinterested freeholders, who, or any three or more of whom, shall constitute a board to ascertain a just compensation to the owners of the several tracts of land and other property upon the line of improvement, within the said county, for such lands, or for such interest or estate therein, and for such other property as are proposed to be taken by such company for its purposes, and to assess damages, if any, resulting to the adjacent or other property of the respective owners, or to the property of any other person or persons beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works. Vacancies in the said board shall shall be filled without further notice by the court making the original appointment. The commissioners shall hold their office during the pleasure of the court, and shall receive three dollars for every day they shall be employed in the performance of their duties, to be paid by the company making application for their appointment.

(16) *Oaths of commissioners.* * * *

(17) *Duties of commissioners; form of their report.* * * *

(18) *Proceedings of commissioners.* * * *

(19) *Company may change location; proceedings therefor; land condemned for former location to revert; company not to use other tracks or roadbeds in lieu of its own; compensation for lands, &c.; extent of change allowed; when company not to remove or abandon location.* * * *

(20) *What contracts to run as a covenant with the land; commissioners' report in respect to same.* * * *

(21) *Clerk to make certified copy of report of condemnation of land, or interest therein, contract, &c., to clerk of court; recordation; fees.* * * *

(22) *When company may enter upon contiguous land for necessary material, or construction of water supply, &c.; what shall not be taken or damaged; notice; appointment of commissioners, &c.; their report; when other commissioners may be appointed; distribution of money paid into court; remedy of aggrieved party.* * * *

(23) *Who may be a party to the proceedings; when right of action will abate.* Any person whose property, or any interest or estate therein, is to be taken, or who claims that he will be damaged in his property by reason of the location, construction, straightening of the line, or change of location, maintenance, or proper and reasonable operation of any works in this act mentioned, or by taking of any land, or other property, or an interest or estate therein, for public use, may appear before the commissioners appointed as in this act provided, at the time and place provided for their meeting, make himself a party to the proceeding, and have his rights passed upon by the commissioners, and his damages, if any, ascertained, allowed, and paid as in this act hereinbefore provided for the taking of land, material, water, or other things. But after the notice required by this act, and the judgment of the court upon the report of the commissioners, and the payment to the person or persons therein named, or into court, for their use, of the sum or sums of money ascertained by such report, no action shall be brought by any person, whether he appeared or not, to recover compensation for the taking of such lands, or other property, or of any

interest or estate therein, or for damages, considered and passed upon by the commissioners, resulting to the owner, or to any other person from the location, construction, straightening of the line, or change of location, maintenance, or proper and reasonable operation of any such works.

(24) *Preceding sections not to apply to certain institutions of learning, hospitals, &c., or lands owned by State, or cemeteries; other institutions.* * * *

(25) *Right of condemnation given school districts and certain state institutions.* * * *

(26) *When sheriff to remove forcible resistance to condemnation.* * * *

(27) *When appointment of commissioners to be vacated; when report vacated.* If, in any proceeding under the provisions of this act, the commissioners shall fail to report as hereinbefore provided within one year from the date of the order appointing them, such appointment shall ipso facto be vacated, and proceedings shall thereafter be had de novo for the appointment of other commissioners, but this section shall not be construed as to preclude the appointment of any one or more, or all, of the former commissioners. If, in any such proceeding, the amount or amounts ascertained by the commissioners as aforesaid be not paid either to the party entitled thereto, or into court, within three months from the date of the filing of the report of the commissioners, the proceedings shall, on the motion of any defendant, be vacated and dismissed as to him, but not otherwise.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 555.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

PAUL BEATTY ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE DEFENDANTS IN ERROR.

Preliminary Statement.

This is a writ of error to review the judgment of the Circuit Court of Appeals for the Fourth Circuit involving a condemnation proceeding instituted and conducted by the United States, and, the case being fairly stated in the brief for the United States, under the rule of this court no repeti-

tion of this statement is required by the defendants in error.

For convenience this brief will be divided into two parts. Part I will treat only of the assignment of error presented to this court for its determination by the plaintiff in error, and Part II will treat of the errors assigned in and considered by the Circuit Court of Appeals, but, for reasons appearing of record herein, not assigned as error in this court. As pointed out, *infra*, the attention of this court need only be directed to Part II of this brief in the event there should be a reversal of the judgment of the Circuit Court of Appeals, because, in this situation, this court, as indicated in the case of *Baker vs. Warner, infra*, is:

> "not limited to the consideration of the points presented by the plaintiff, but, this being a writ of error from an intermediate appellate tribunal, must enter the judgment that should have been rendered by the court below on the record then before it."

See also *Wickliffe vs. Owings*, 17 How., 47, and *Semmes vs. U. S.*, 91 U. S., 21.

With respect to the petition for writ of certiorari applied for on behalf of the Government, in the event this court shall be of opinion that the judgment of the court below is not final, the defendants in error, without in any way acquiescing in this petition for a writ of certiorari, content themselves by directing the attention of the court to the obvious principle that an appeal lies only where the judgment of the court below is final.

A judgment of reversal, by which the cause is remanded for further proceedings, is not a final judgment and cannot be reviewed by the Supreme Court of the United States.

Rice vs. Sanger, 144 U. S., 197.

Brown vs. Bank, 146 U. S., 619.

Part I.

ARGUMENT.

The assignment of error herein may only be intelligently disposed of by bearing in mind certain fundamental propositions of the law and history of eminent domain.

1. Eminent domain is inherently an attribute of sovereignty, and exists independently of the method of its exercise, fixed either generally or for a particular case by the legislature.

2. There was no common-law method of exercising this sovereign right, which lay dormant and inert until Parliament, the supreme law-making power in England, prescribed the manner of taking and the compensation therefor.

3. The supremacy of Parliament in this regard carried with it the unrestricted right in each particular case both to take without compensation, or, if compensation was to be allowed, to ascertain this compensation by such person, commission, or tribunal as it saw fit.

4. The colonial assembly or legislature, prior to our written constitutions, except where controlled by some express law of the mother country, was also supreme both as to fixing compensation, if any, and in declaring the manner of its ascertainment.

5. Written constitutions, both State and Federal, have imposed certain limitations upon the legislature in the exercise of this right.

6. The Federal Constitution, with the provisions of which only we are here concerned, imposes two such limitations found in the V and VII Amendments, respectively:

> V. * * * nor shall private property be taken for public use without just compensation.
>
> VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * *

In the light of the foregoing principles the assignment of error will be considered in the manner indicated in the brief of plaintiff in error in its effort to maintain:

1. The Circuit Court of Appeals erred in holding that the appellees were entitled as a constitutional right to a trial by a common-law jury on the question of compensation.

2. The Circuit Court of Appeals erred in holding that the appellees had not waived their right, if any they had, to such jury trial.

I.

The Seventh Amendment of the Constitution of the United States is controlling in condemnation proceedings, any statute to the contrary notwithstanding.

a. A condemnation proceeding conducted as in the case at bar is a suit "at common law" as contemplated by the seventh amendment.

In the case of Kohl *vs.* United States, 91 U. S., 367, the question presented was the right of the Circuit Court of the United States to entertain jurisdiction of proceedings for condemnation within the meaning of the statute conferring jurisdiction upon said court in suits at law.

The court said (pp. 375, 376):

> "When, in the eleventh section of the judiciary act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity as well as suits in admiralty."

Again, on page 375, the court said:

> "If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it vested in the circuit court. That it is a 'suit' admits of no question."

Again, on page 376, the court said:

> "It is difficult, then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not within the meaning of the statute a suit at common law when initiated in a court."

The language just quoted is cited in Upshur County *vs.* Rich, 135 U. S., 467, where the court, on page 476, referred to the Kohl case, *supra*, as holding that a proceeding for the condemnation of land for a post-office is a suit.

In Chappell *vs.* United States, 160 U. S., 499, both the Kohl case, *supra*, and the Upshur County case, *supra*, are cited in support of the proposition that a condemnation proceeding (p. 513):

> "instituted and concluded in a court of the United States was in substance and effect an action at law."

The contention of the Government, on page 8 of its brief, that the proceeding in the case at bar was not "in the nature of a litigation in court *inter partes*," and therefore "cannot be considered a suit at common law," is effectually disposed of by the following extract from Mr. Justice Strong's opinion in the Kohl case, *supra*, on page 376:

> "It (proceeding to take land under eminent domain) is an attempt 'to enforce a legal right.' It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided."

b. A condemnation proceeding, being a suit "at common law" within the meaning of the seventh amendment, it follows that a common-law jury is essential to the validity of such proceeding.

The following principles will be helpful in considering the cases cited by the plaintiff in error in contesting the right of the defendants in error to have a common-law jury fix the compensation:

1. Was the question as to the right of a common-law jury directly presented on the record?

2. If so presented, is the case one of *removal* from a State to a Federal court, or is it a case where the proceedings to condemn were *originally* instituted in a Federal court?

We shall maintain in discussing this branch of the case that the Supreme Court has never directly passed upon the right to a jury trial with the exception of the *Chappell* case, *infra*, in a case where the condemnation proceedings *originated* in a Federal court, as in the case at bar, where a jury was demanded, and that any expressions by that court to the contrary are merely *dicta*. This is manifest from an analysis of the decisions of this court cited by the plaintiff in error:

It has been contended that the court in the case of Kohl *vs.* United States, *supra*, held that the Government has the right to take property with or without a jury. We submit that the Kohl case is not authority for such a contention. In the first place any such statement in that case was *obiter*, as that question was not before the court, there actually being a jury trial, and the case arose upon the question whether a condemnation proceeding was a "suit at law" under the act conferring jurisdiction upon the circuit court. And in the second place the language referred to is as follows: "They (Congress) might have prescribed in what tri-

bunal, or by what agency the taking and the ascertainment of the full compensation should be accomplished." The language here employed had reference simply, as was afterwards stated in the case of the United States *vs.* Jones, *infra*, to "the proceeding for the ascertainment of the value of the property and consequent compensation to be made—as a *preliminary to the actual* taking of the property." There was no contention in the case that the parties were not entitled to a jury, and the court was simply speaking of "the process by which the contemplated condemnation should be effected." This is more clearly seen by reference to the dissenting opinion of Justice Field, who did not agree with the majority of the court that a condemnation proceeding was a *suit at law*, wherein it is stated, as admitted, that if the proceeding is a suit at law the intervention of a jury would be required by the Seventh Amendment to the Constitution.

In United States *vs.* Jones, 109 U. S., 513, the court on page 519 said that a condemnation proceeding to ascertain value of property

> "may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury as the legislative power may direct."

But the only question before the court was whether the United States could use a State tribunal for condemnation proceedings, and the court said (page 518):

> "The only point presented, upon which we can pass, relates to the jurisdiction of the court below; if that can be sustained, its judgment must be affirmed."

In Luxton *vs.* North River Bridge Co., 147 U. S., 337, the assessment was made by commissioners, and the court, as plaintiff in error says, may have "assumed" in its opinion

that this method was unobjectionable, but the only question decided in that case was (syllabus) that:

> "An order of the Circuit Court * * * appointing commissioners to assess damages for land taken * * * under the act of July 11, 1890, * * * is not a final judgment, upon which a writ of error will lie."

In Long Island Water Supply Co. *vs.* Brooklyn, 166 U. S., 685, the court said assessment for damages "may be made by commissioners, at least where there is provision for a review of their proceedings in the courts."

But this was a case in error to the Supreme Court of the State of New York, and the court said, on page 688:

> "So far as respects any mere matter of procedure or of conflict between the statute authorizing the condemnation or the proceedings had thereunder and the constitution of the State, the decision of the Court of Appeals is conclusive."

And again on the same page the court said:

> "The contention of the plaintiff in error is that the proceedings had under the statute, which resulted in the judgment of condemnation, violate section 10, article 1, of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of contracts, and were not 'due process of law,' as required by the Fourteenth Amendment."

The case of Bauman *vs.* Ross, 167 U. S., 548, has perhaps been most frequently cited by the text-book writers and by the courts in support of the contention of the plaintiff in error.

The Circuit Court of Appeals in its opinion quoted the passage relied on and cited by the plaintiff in error in its brief and had this to say of that case (Rec., 151):

> "In Bauman *vs.* Ross (167 U. S., 548), the case came up in the District of Columbia under the act of

> Congress of March 2, 1893, providing for the acquisition of ways for highways in the District of Columbia, and which provided for an assessment on a trial before a court and a special jury of seven persons. No question was made or argued in the case that the party was entitled to a jury of twelve men."

And again on the same page the court said:

> "The only question for decision before the court in Bauman *vs.* Ross, as appears from the statement in the opinion of the court itself on this point, was whether section 15 of the act was invalid because it committed two different assessments to the same jury. There was nothing either asserted or argued in the case that called for a ruling that no jury of any kind was requisite."

In Chappell *vs.* United States, 160 U. S., 499, as pointed out in the opinion of Judge Smith (Rec., 150), there was

> "a proceeding for condemnation filed in the District Court for the District of Maryland under the act of Congress of August 1, 1888, and the question was whether the party was entitled to two juries. The trial was regularly had before the District Court itself and a special jury of twelve impanelled by the court for the purposes of that particular inquisition. The contention of the party was that he was entitled to a hearing before a special jury and then a trial *de novo* before another and a regular term jury. The Supreme Court held that the defendant had had the benefit of a trial by an ordinary jury at the bar of the District Court, and was not entitled to a second trial by jury, except at the discretion of the trial court or upon reversal of its judgment for error in law."

It is not apparent to the defendants in error what bearing the case of Capital Traction Co. *vs.* Hof, 174 U. S., 1, 43, has upon the error now under consideration. While the court in that case upheld the constitutionality of a statute enlarging the jurisdiction of justices of the peace in the Dis-

trict of Columbia and granting a jury trial only on appeal, yet we are here complaining of the denial by the District Court to the defendants in error of any jury trial at all. We would have been contented if, upon the bringing in of the commissioners' report, a jury had been empaneled to try the exceptions to that report or to try the issues of fact *de novo* as to what was just compensation for the land taken. In the case of *Capital Traction Co., supra,* a jury trial on appeal was expressly guaranteed by the statute, but the defendants in error were altogether deprived of a jury trial by the District Court (R., 142), although entitled thereto by the Seventh Amendment and section 566 of the Revised Statutes, providing that all issues of fact in the District Courts in all causes except cases in equity and admiralty and maritime jurisdiction and bankruptcy proceedings shall be by a jury.

In the case of Shoemaker *vs.* United States, 147 U. S., 282, also cited by the plaintiff in error, the question as to the right to a jury trial in condemnation proceedings was neither raised on the record, argued by counsel nor discussed by the court in its opinion.

The case of Custiss *vs.* Turnpike Co., 6 Cranch, 233, simply decided that the Circuit Court for the District of Columbia had no jurisdiction to quash an inquisition taken under the act "to authorize the making of a turnpike road from Mason's Causey to Alexandria." Here also the right to a jury was neither raised nor discussed.

In West River Bridge Co. *vs.* Dix, 6 How., 507, it was held that the Constitution of the United States did not take away from the State the right, in its exercise of eminent domain, to condemn a bridge, although held by an incorporated company under a charter from the State, and that such a charter, like all private rights, was subject to the right of eminent domain.

The case of Secombe *vs.* Railway Company, 23 Wall., 108, 117, 118, though relied on by the plaintiff in error, inti-

mates that the legislature has discretion in the exercise of the right of eminent domain *only* where there is nothing in the *organic law* to the contrary, and the court said on page 118:

> "It is no longer an open question in this country that the mode of exercising the right of eminent domain, *in the absence of any provision in the organic law prescribing a contrary course,* is within the discretion of the legislature." (Italics ours.)

It is respectfully submitted that the above analysis of the foregoing cases cited in brief of plaintiff in error discloses that none of these cases directly raises the question of the right to a common-law jury in condemnation cases, unless it be in the *Chappell* case, which the defendants in error rely on as sustaining their contention and the force of which the plaintiff in error in its brief on page 16 seeks to minimize by suggesting that Mr. Justice Gray, who also wrote the opinion in Bauman *vs.* Ross, could not have used the language in the latter opinion "if his previous decision in Chappell *vs.* United States was susceptible of the construction placed on it by the defendants in error." A sufficient reply to this suggestion, as already pointed out *supra,* consists in the fact that the only question before the court for decision in Bauman *vs.* Ross was whether section 15 of the act was invalid *because it committed two different assessments to the same jury.*

But the plaintiff in error, after reiterating in its brief that a right to a jury trial is "assumed" in a large number of cases, states on page 17 thereof that the lower Federal courts ruled on the "precise point" in the case of Great Falls Manufacturing Company *vs.* Garland, 25 Fed., 521, 524, and United States *vs.* Engerman, 46 Fed., 176, and the case of High Bridge Lumber Company *vs.* United States, 69 Fed., 321-325. It is sufficient to call attention to the fact that both the *Great Falls Manufacturing Company* and the *High Bridge Lumber Company* cases rely upon the *Kohl* and

Jones cases, *supra*, which cases we have already pointed out never passed upon the question at all, while United States *vs.* Engerman, decided the question without the citation of a single authority. No comment need be made upon the additional cases in the lower Federal courts cited by the plaintiff in error further than to say that it is only claimed that said cases "inferentially" considered the question as to the right to a jury trial.

The Seventh Amendment is not binding upon the State courts, as appears from the case of United States *vs.* Jones, *supra*, and the difference between a case originating in the courts of the State and one where the initial jurisdiction and procedure is in the United States courts is set forth in the case of the Postal Telegraph & Cable Co. *vs.* Southern Rwy. Co., decided by Judge Simonton, 122 Fed., p. 156. This was a case originating in the State of North Carolina and removed to the United States court. It was sought to have appraisement made by a jury in accordance with the provisions of the United States statute, the North Carolina law not requiring a jury. Judge Simonton says:

> "It must always be kept in mind that this is a case removed from the State court."

After reviewing many cases, the learned judge discussed the case of Chappell *vs.* U. S., *supra*, and said of that case:

> "It is very clear that this case cannot be relied upon as deciding that in removal cases no condemnation can be had without a jury. In the first place, it was not a removal case, but a cause in the original jurisdiction. This point was never raised, discussed or decided."

Again it must be borne in mind that the requirement of the act of August 1, 1888, under which the proceedings in the case at bar were had, only requires that the practice, pleadings, etc., conform "as near as may be" to the practice,

pleadings, etc., existing in like causes in the State courts. This court, in Luxton *vs.* North River Bridge Co., 147 U. S., 337, in speaking of this question of conforming to the State practice as near as possible, said:

> "It must give way whenever to adopt the State practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of Congress."

It became incumbent, therefore, upon the district court at some stage of the proceedings to give the defendants in error the benefit of the provisions of the Seventh Amendment as well as to section 566, R. S. U. S., which directs that

> "issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction should be raised by jury."

In this connection the attention of the court is directed to the fact that the proceedings herein were had under sections of Pollard's Virginia Code (1904), set forth in full under Appendix B on pp. 23 *et seq.* of the brief of the plaintiff in error. The substantial provision of the Virginia law with which we are here concerned is found in paragraph 4 of section 1105*f* of said Code, which provides that:

> "Any company *heretofore or hereafter chartered by this State,* which is authorized by its charter or the laws of this State to condemn land or other property, or any interest or estate therein, for its uses, which cannot, because of the incapacity of the owner, or any one of them, or inability to agree upon the price or terms," etc. (Italics ours.)

The foregoing section would, therefore, appear to apply only to public service corporations such as railroads and canals and it does not, in terms at least, contemplate condemnation proceedings by the United States. If this contention is correct the position of the plaintiff in error that

they have conformed to the Virginia statute in such cases made and provided is without merit, and the proceedings herein must, therefore, be had by virtue of and in conformity with the Federal statutes, limited only by the provisions of the Constitution of the United States.

II.

Was the Right to a Jury Trial Waived by the Defendants in Error?

It is not denied that the "right to a jury trial might be waived by the parties," as said by Mr. Justice Miller in Kearny *vs.* Case, 12 Wall., 275, but this waiver must appear directly of record, and not by inference. The only thing the defendants in error consented to, as will appear from the Record on page 15, was to the *personnel* of the commission and the language used in the order appointing the commissioners is that "the court doth adjudge * * * that these causes be docketed, and by agreement of the parties doth appoint" the parties therein named commissioners to ascertain just compensation for the land. In the Kearny case the court heard the pleading, evidence, and argument "before the judgment was entered" without objection, but in the case at bar the proceedings were not permitted to go on to judgment without demanding a trial by jury; and the very moment the commissioners, who held their sessions out of the hearing of the court, which were in the nature of a preliminary and *ex parte* inquest, brought their report into court, the defendants in error raised an issue of fact by objecting to this report and insisting that a jury be empanelled either to try the exceptions to the report of the commissioners or to fix compensation by a hearing *de novo*. At that point the proceedings became a *suit* or *action at law*, and under the Seventh Amendment the defendants in error were entitled to a jury. The case of Boom Co. *vs.* Patterson, 98 U. S., 403 (8 Otto), emphasizes

the correctness of this contention of the defendants in error. That was a case removed from the District Court of Minnesota, where the proceedings began, to the Circuit Court of the United States. Speaking of the character of the proceedings before the commissioners, Mr. Justice Field, on page 406, said:

> "The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of these terms. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

In a word, the contention of the defendants in error is that when the inquest reaches the point where the preliminary inquest made by the commissioners is brought into court in the form of a report, the point in the proceedings is reached where a jury trial may be demanded, as was done in the case at bar, and a refusal to empanel a jury under the circumstances was violative of the Seventh Amendment to the Constitution.

In the other case cited by plaintiff in error on this point (Perego *vs.* Dodge, 163 U. S., 160), no objection to proceeding without a jury was made until a decree had been signed, with respect to which the court said, on page 166:

> "By his selection of this form of action and his *proceeding to a hearing and decree without objection,* his present contention in respect of deprivation of trial by jury came too late." (Italics ours.)

In Bayliss *vs.* Travellers' Insurance Company, 113 U. S., 316, 321, the court said:

> "The right of trial by jury in the courts of the United States is expressly secured by the seventh ar-

ticle of amendment to the Constitution of the United States, and Congress has by statute provided for the trial of issues of fact in civil cases by the court, without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. (R. S., 648, 649.) This constitutional right this court has always guarded with jealousy. Elmore *vs.* Grymes, 1 Pet., 469; De Wolf *vs.* Raband, 1 Pet., 476," etc.

The exact language of R. S. U. S., section 649, is:

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury."

So that we have here neither the case of a *waiver in writing, as required by the statute, nor the case of acquiescence throughout the proceedings up to and including the final decree or judgment*, as in both of the cases cited by the Government under this assignment of error.

Part II.

ARGUMENT.

Error Appearing of Record and Considered by the Circuit Court of Appeals but Not Assigned as Error in This Court by the Plaintiff in Error Herein.

The points that are now to be considered by the defendant in error will be considered by this court only in the event it should be of opinion that the judgment of the United States Circuit Court of Appeals should be reversed. In the event of affirmance, however, there would, of course, be no occasion to consider any error appearing of record, but not assigned as such by the plaintiff in error in this court.

The duty of this court in a situation of this character is stated in the very recent case of Baker *vs.* Warner, U. S. Supreme Court, opinion in which was handed down December 22, 1913. In that case the court used the following language:

> "The plaintiff Baker had a judgment in the trial court. The defendant Warner took the case to the Court of Appeals on various grounds, most of which were sustained. The plaintiff then brought the case here, assigning error on some of those rulings, but not on others. But we are not limited to a consideration of the points presented by the plaintiff, but, this being a writ of error from an intermediate appellate tribunal, must enter the judgment, which should have been rendered by the court below on the record then before it."

The defendants in error contend that the judgment of the Circuit Court of Appeals was right, even though this court should be of opinion that the ground upon which the judgment was rendered was erroneous, and that there were other grounds upon which it may be affirmed. In such a situation

the plaintiff in error would suffer no injury should this court refuse to reverse. Runkle *vs.* Steel Co., 153 U. S., 216, 224. This principle was enunciated in the case of Barth *vs.* Clise, 12 Wall., 400, 401, where the court refused to reverse a judgment against a plaintiff for instructions, however erroneous, where the record shows plaintiff's case to be inherently and fatally defective.

These errors may be stated as follows:

I. There was no act of Congress or law of the United States authorizing the acquisition of the property herein by condemnation. (R., 28.)

II. The petition, under which these proceedings were instituted in the District court, is not sufficient in law. (R., 28.)

III. The error of the District court in not sustaining the exceptions to the commissioners' report as to the value of the land taken, the compensation not being just, adequate and full. (R., 28.)

I.

That there is no act of Congress or law of the United States authorizing the acquisition of the land and property mentioned in these proceedings by condemnation.

The sole question presented by this and the other assignment of error under I (R., 38) involves the question as to whether the word "purchase," as used in the appropriation act (36 Stats., 1037, 1049), March 3, 1911, excludes the acquisition by condemnation proceedings of the land for a remount station, as provided in that act. The determination of this question turns, first, upon the inquiry (*a*) whether the word "purchase" as used in that act was employed in its limited or popular sense, or in its techincal or enlarged sense,

and second, (*b*) whether the condemnation proceedings had herein are warranted by said appropriation act when interpreted and construed in connection with the general act of August 1, 1888, wherein general provision is made for procedure in cases where the Government is authorized "to procure" real estate for certain purposes therein set forth (R., 30), and (*c*) whether any authority was given the Government to acquire the land herein by *any method*.

A.

What construction is to be given the word "purchase," as used in the appropriation act, when construed apart from the general act of 1888?

It is readily conceded that the word "purchase," if employed in a strictly technical sense, is broad enough to embrace any method of acquisition of lands short of descent, and is, therefore, broad enough to cover the acquisition of property by condemnation in the exercise of the conceded power of eminent domain, the contention of plaintiffs in error being that the context of the appropriation act, in which this word "purchase" is used, limits the Government to one method of acquisition, namely, to a contract of purchase entered into by and between the Government and the land-owners. In making this argument it is not necessary to deny the unqualified right of eminent domain, or the right to condemn property in the exercise of this governmental prerogative, but it is equally clear that the Government in its exercise has a right through Congress, its agent, to limit and define the manner of its exercise in a particular case. We find ourselves unable to agree with the learned justice that "an attempt to restrict acquisition to voluntary sales would probably defeat the purpose for which the appropriation was made;" for, certainly, if the owners should refuse to enter into a contract of purchase, subsequent legislation could be enacted to remedy the situation. Besides, it may be

fairly urged that the very purpose of the appropriation act in using the word "purchase" was to relieve the land-owners from the vexation, expense, and delay ordinarily incident upon condemnation proceedings, especially, as in the case at bar, where the hearings are had at points far removed from the location of the property and the residence of the plaintiffs in error and their witnesses."

That the word "purchase" has such a limited or popular meaning even when used in connection with the acquisition of real estate was recognized by Blackstone, who in his Commentaries (2 Black. Com., 241) says that the word in its popular acceptation is—

> "Applied only to such acquisition of lands as are obtained by bargain and sale for money, or some other valuable consideration."

The foregoing language is quoted with approval in the following cases, one of which will hereafter be the subject of further consideration.

Enterprise, &c., *vs.* Smith, 62 Kans., 815, 817.
Purcell *vs.* Smith, 21 Iowa, 540, 546.
Grant *vs.* Bennett, 96 Ill., 535.

The criterion by which it is to be determined whether words in a statute are used in a technical or popular sense is thus laid down:

> "Words in common use, and also having a technical sense, will, in acts intended for general operation and not dealing specifically with the subject to which such words in their technical sense apply, be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest."
>
> Suth. Stat. Const., sec. 395.

Another authority states the rule thus:

> "But, in general, statutes are presumed to use words in their popular sense. * * * Hence, the tech-

nical meaning is rejected as soon as the judicial mind is satisfied that another is more agreeable to the object and intention."

Suth. Stat. Const., sec. 393.

This court, in the case of Malliard *vs.* Lawrence, 16 Howard, 251, said:

"The popular or received import of words furnishes the general rule for the interpretation of statutes."

It is evident, therefore, that the word "purchase" in the act in question was not used in its technical, legal sense, because such act is not inclusive of, or identified with, the technical subject of title to real estate by purchase, but is inclusive of, and identified with, the general subject of acquisition of title to real estate for the purpose of a remount station. Bearing in mind that the appropriation act under consideration purports to exercise sovereign power of dispossessing the citizen of his property, all authorities hold that such statutes are to be strictly construed and no effect by implication is to be allowed to such statutes other than what is reasonable and necessary.

"An act of this sort deserves no favors; to construe it liberally would be sinning against the rights of property."

Binney's Case, 2 Bland., ch. 99.

In the leading case, City Enterprise *vs.* Smith, 62 Kans., 815, 820, it was held that the word "purchase" was used in title of Laws, c. 82, reading: "An act authorizing and empowering cities * * * to obtain * * * water by purchasing or constructing, owning and operating water works * * * by said cities," in its popular but restricted sense to acquisition of property by voluntary agreement for a valuable consideration and not in its technical or enlarged sense to acquisition by all means other than by descent or operation of law, and, consequently, the court held

that title of the act did not express the subject of the acquisition of the water-works property by condemnation proceedings, and that section 12 of the act, which purported to authorize such proceedings, was void.

The court then added the following on page 820 of its opinion:

> "We regretfully come to this conclusion because the statute is of much interest and beneficial in its object; but it is better that its defects be pointed out at this early date after its enactment, so that the legislature may have like opportunity to correct them."

The case of Burch *vs.* Mechanics' Insurance Company, 106 Mass., 356, 364, is generally cited in text-books and encyclopædias as the leading case supporting the proposition that the word "purchase," when used in a statute alone, is broad enough to cover acquisition by condemnation. A careful examination of this case discloses that it does not support this contention. In that case the State of Massachusetts, in the exercise of its right of eminent domain, passed an act giving its consent to the United States "for the purchase of land in the city of Boston for the subtreasury and post-office site." In the second section of this act (357), the alternative provision was made that if the parties could not agree in a sale or purchase, the land might be appraised by a jury upon petition, and on payment or tender of the amount of the appraisement, with costs, the land should vest in the United States. The court, in view of this double or alternative aspect of the statute, had no difficulty in holding (364) that the property thus acquired, under the second section of the act, was in legal phrase a title by purchase. If, however, as in the case at bar, there had been no alternative method of acquisition, upon failure of the parties to agree upon terms of sale, it is clear the court would have denied the right to condemn, however great the hardship thereby imposed.

In the appropriation act of 1911 there was simply a provision for the "purchase" of certain lands for a remount sta-

tion, and, there being nothing in the act providing for any means of acquisition other than what is popularly understood by the word "purchase," which is used again in this act in the past tense when referring to the "purchase" of horses, the conclusion seems inevitable that the word in said appropriation act was used in its narrow, popular and restricted meaning, and hence excludes acquisition by condemnation proceedings as was here attempted.

In view of the foregoing, the language of the Supreme Court of the United States, although dicta, in the case of Kohl *vs.* United States, 91 U. S., 367, may be quoted with confidence in support of the foregoing conclusions (374):

> "The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. * * * But generally in statutes, as in common use, the word is employed in a sense not technical, only as meaning acquisition by contact between the parties, without governmental interference."

B.

WHETHER THE GENERAL ACT OF 1888 IS BROAD ENOUGH, INDEPENDENTLY OF A FAIR CONSTRUCTION OF THE WORD "PURCHASE" IN THE ACT OF 1911, TO AUTHORIZE THE GOVERNMENT TO ACQUIRE THE LANDS IN THE CASE AT BAR BY CONDEMNATION PROCEEDINGS.

It becomes now necessary to inquire whether under the assignment of error now under consideration the language of the act of 1888, in its prospective feature, is broad enough to annex the remedy or procedure therein set forth to the act of 1911, even though the word "purchase," when considered with sole reference to the act of 1911, is not broad enough to embrace title by condemnation proceedings.

All statutes are supposed to be enacted with reference to

existing statutes, particularly when referring to the same subject matter, but "this rule of construction is to be restricted to cases where the statute in question is really doubtful."

It is to be observed that the word "purchase" is not used in the act of 1888, but the word "procure" is used, which we contend has a meaning different from the word "purchase" as used in the act of 1911 by interpreting in conget no light on the proper interpretation of the word "purchase" as used in the act of 1911 by interpreting in connection therewith the other word "procure" as used in the act of 1888.

It must not be overlooked, however, that the rule requiring statutes in *pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute and that it cannot be invoked when the language of the statute is clear and unambiguous.

Schaeffer *vs.* Burnett, 221 Ill., 315.

In Goodrich *vs.* Russell, 42 N. Y., 177, it was held that "the rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous ones."

In Rich *vs.* Keyser, 54 Pa. St., 86, it was held "that where words of a subsequent statute differed from those of a prior statute on the same subject, it is an intimation that they are to have different construction."

While it is a sound rule of construction that a general and special statute dealing with the same general subject should be harmonized if possible, "yet where the special statute is later it will be regarded as an exception to or qualification of the prior general one."

State *vs.* McMillan, 55 Fla., 246, 254.
Carland *vs.* Custer Co., 5 Mont., 579.
Cincinnati *vs.* Holmes, 56 Ohio St., 104.
Hawkins *vs.* Bare, 63 W. Va., 431.
Metropolitan District R. Co. *vs.* Sharpe, 5 App. Cas., 425 (England).

C.

Was any authority given the Government to acquire the land by any method?

The authority for this proceeding is claimed under the act of Congress entitled "An act making appropriation for the support of the army for the fiscal year ending June 30, 1912, approved March 3, 1911." This provides that a certain sum of money be appropriated, "not to exceed $200,000, for the purchase of land accessible to the horse-raising section of the State of Virginia for the assembling, grazing, and training of horses, certain other money * * *."

There is no other statute than this authorizing the acquisition of property in the State of Virginia for the purpose for which this is sought to be taken. Mr. Cooley in his Const. Lim., page 666, in speaking of the exercise of the prerogative of eminent domain, says:

> "Express legislative power moreover is needed for these purposes."

Mr. Mills, in his Eminent Domain, sec. 48, says:

> "The act authorizing condemnation must be express and clear. If there are doubts as to the extent of the power * * * the doubts should be resolved by a decision adverse to the claim of power."

Judge Speer discusses this question in The U. S. *vs.* Rauers, 70 Fed., 748, and in a case where there was an appropriation for a lighthouse said:

> "The Secretary of the Treasury is not, by the terms of the statutes, authorized to procure real estate; as I have said above, he must be expressly so authorized before he is authorized to proceed by condemnation in his discretion. Congress has repeatedly recognized site," etc.

The court then cites cases, one of which was the establishment of a public building at Bay City, Michigan, where the act provided:

> "The Secretary of the Treasury be and is hereby authorized and directed to purchase or provide by purchase, condemnation proceedings or otherwise, a site, etc."

Then the court calls attention to the fact that in this and every other instance there was express authority to the Secretary of the Treasury to secure the real estate for public purposes. The court then calls attention to the case of The U. S. *vs.* Certain Tract of Land, 70 Fed. Rep., 840, the Gettysburg case. In that case Congress had made an appropriation of $25,000 for marking with tablets the positions occupied by the various parts of the army, but no express authority having been granted to the Secretary of War to procure the lands, it was held that:

> "The power of the United States Government to take private property for public uses, etc., cannot be exercised in the absence of legislative authority."

In order to cure the defect Congress passed a special act. Judge Speer then says, page 751:

> "It is rarely the case where eminent text-writers and the legislature itself coincide so strongly in the recognition of a legal principle, that principle being that there must be express authority in the Secretary of the Treasury, when charged with such matters, to procure land for public use, before he is authorized, in his discretion, to proceed by condemnation for that purpose."

The court then held that Mr. Rauers, who owned the property which they were undertaking to get for a lighthouse station, being unwilling to part with it, the Government had no authority to proceed to appropriate it. This decision, as it would seem, would be conclusive of the proposition that the

Government had not by any act authorized the procurement of this land in any way, except, perhaps, by agreement with the parties.

It was held in The U. S. *vs.* Certain Land in Narragansett, 145 Federal, 654, citing the Rauers case, *supra*, and other cases, that the act of August 1, 1888, confers no general authority to acquire, but only authority to institute, proceedings for condemnation where its acquirement is otherwise authorized.

II.

That the said petition is not sufficient in law.

Assuming, for the purpose of this discussion, that the Government would have the right to condemn the lands in controversy under the general act of 1888, yet the petition on its face is insufficient, because it fails to rely upon this act, and in arriving at what is a proper construction to be placed upon the word "purchase," when these two acts are considered together, it is of importance to point out the failure of the Government in its petition in the case at bar to bring the proceedings herein under the act of 1888.

The petition makes the following averments (R., 8):

> "Your petitioner * * * respectfully represents that by an act of Congress of the United States, entitled 'An act making appropriations for the support of the army for the fiscal year ending June 30, 1912,' approved March 3, 1911, petitioner, by its proper officials was authorized to acquire land accessible to the horse-raising section of the State of Virginia * * * for mounted service. * * * That petitioner is authorized by the statute in such cases made and provided to condemn the land for its uses and purposes aforesaid. * * * Wherefore your petitioner prays for appointment of commissioners, as provided by law, to ascertain what will be a just compensation for the land purposed to be condemned for its use, and award damages," etc.

Thus it will be seen the defendant in error elected to pursue the remedy and procedure supposed to be authorized by the act of 1911. If condemnation proceedings are not authorized by the act of 1911, under which the defendant in error has elected to file its petition, it cannot now be allowed to convert its action into one brought under the act of 1888, which act is nowhere specifically referred to, much less adopted, by express references in petition, unless the following averment in said petition makes some reference to the act of 1888 (R., 8):

> "That said official of petitioner, so authorized to procure said real estate, made application to the Attorney General for petitioner to cause proceedings to be commenced for the condemnation of said real estate,"

but the petition nowhere alleges that the Attorney General caused such proceedings to be commenced within the time set forth in the act of 1888 after said application is made. The language of the act of 1888 is as follows (R., 31):

> "And it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

It would seem that compliance with such an important statutory provision would affirmatively appear in the petition if the Government intended to proceed under the act of 1888, and the failure of the petition to bring it within the terms of the latter act would seem to demonstrate that such act was not in the mind of the United States attorney when the petition in the case at bar was drafted.

To uphold the authority of the Government to condemn the land in controversy upon a petition, which expressly relies upon the appropriation act, which is silent upon the question of procedure, whether by condemnation or otherwise,

would be to supplement and not to construe a legislative enactment; and to sustain the petition under these circumstances would be to do violence to the universal rule of interpretation of statutes of this sort, which rule requires a strict construction and holds that any authority exercised under a statute providing for the taking of private property must plainly appear and may not be deduced from ambiguous language by doubtful inference.

This principle is well established in the case of Enterprise *vs.* Smith, 62 Kans., 821. We quote as follows:

> "Without inquiring whether the act of 1872 is efficacious to accomplish the purpose, it is sufficient to say that it did not bring its proceeding under that statute, but limited it to the statute of 1897. * * * It will be seen, therefore, that the plaintiff in error elected to pursue the special remedy supposed to be afforded by the act of 1897. That remedy in forms of procedure at least differs in several particulars from those of the act of 1872. The city cannot now be allowed to convert its action into one brought upon the latter-named statute."

III.

That the said report of the commissioners as to the value of said land was not supported by the evidence but was contrary to the evidence, in that said commissioners refused to allow and award to certain of these defendants as much as witnesses swore they were willing to pay for the land. This is true as to part of the land of Alma Jackson and the Macatee land (R., 28).

This assignment will be considered generally in connection with the second assignment of error (R., 27) as follows:

> "That the damages awarded by the said commissioners, to wit, to Paul Beatty of $15.00 per acre, for 30 acres and 54 square poles, and to William Brown and James William Bundy of $500.00 for 3½ acres and building, and to Alma Jackson and Robert H.

> Jackson, her husband, for the first tract of 65 acres and 20 square poles at $57.00 per acre, and for the second tract of 45 acres and 100 square poles at $45.00 per acre and to S. E. Macatee, Roberta Macatee Earle, and John B. Earle, her husband, Margie J. Macatee and Sarah R. Macatee of $60.00 per acre for 215 acres and to Lucretia Thompson and Smith W. Thompson, her husband, of $62.50 per acre for 19 acres and 34 square poles, and to Carrie Kuser, $900.00 for her house and 9 acres and 57 square poles of land, and to Lucy E. Barbee, $55.00 per acre for 85 acres and 20 square poles, for lands of said defendants which is sought to be condemned in these proceedings; is not a sufficient, just or adequate compensation for said lands or any of them."

In the case of Luxton *vs.* North River, &c., Co., 147 U. S., 329, it was held that the proceedings in the Circuit Court of the United States should "conform as nearly as may be to the practice in the courts of the State."

What is "just compensation" therefore may be arrived at by the definition given to this term by the Virginia courts.

It is thus defined in Hunter's Administrator *vs.* C. & O. R. R. Co., 107 Va., 158:

> "It is the market value of the property in view of any purpose to which it is adapted. The full and perfect equivalent for the property taken is what the law contemplates as the market value thereof."

While it is true, as held in the foregoing case, an appellate court will not ordinarily interfere where the evidence is conflicting, especially where the commissioners have viewed the premises, yet where the damages are inadequate and it is clear that the tribunal has proceeded upon erroneous principles or has disregarded the evidence in the case, the rule is otherwise.

Lewis, Eminent Domain, sec. 776, p. 1379.

From the following extract from the opinion of the learned judge below, it would seem that the principal reason

on his part for sustaining the findings of the commissioners grew out of the fact that in his opinion they were fair men and intended to award full compensation (R., 37):

> "After careful consideration I have concluded that I should confirm the reports in each of these cases. No attempt will be made to discuss the evidence in detail. A very considerable number of honest witnesses have expressed opinions to the effect that the land is worth considerably more than the commissioners have reported. Opinion evidence is advisory only and is not binding. *The Conqueror,* 166 U. S., 131, *et seq.* The commissioners in these cases were agreed upon by the parties. The impression made upon me by their appearance and demeanor upon the witness stand was most favorable. There has been no suggestion of any improper influence brought to bear upon them. To my mind they undoubtedly intended to award full and fair compensation."

The case of The Conqueror, 166 U. S., 131, *et seq.,* cited by the court below in support of the rejection of expert testimony placed before the commissioners as to the value of the lands in the case at bar for apple orchards, the expert testimony in that case, which the court said might be rejected, related to loss of profits or *demurrage* for the detention of a vessel, which profits the court said must be proven with reasonable certainty. But it cannot be urged there was any lack of certainty as to the value placed upon these lands by the disinterested fruit experts. The fruit area in Virginia is known to be limited and of increasing value, and the very lowest value of some of this land, as shown by the following extracts of testimony, was $75 per acre, a sum substantially 50 per cent in excess of the value actually placed upon it by the report of the commissioners. In other words, if the commissioners had considered the only testimony in the case relating to value in view of the very valuable uses, to wit, fruit raising, to which the land was adapted, their findings must

have been largely in excess of the figures named in their report.

The foregoing consideration will find emphasis and support in the following extracts of testimony, although no attempt is made in this supplemental brief to review in detail the testimony as to value, for the reason that such review may be found in the main brief filed herein.

G. W. Konier, Commissioner of Agriculture of the State of Virginia for 12 years, testified (R., 43):

> "* * * The Macatee tract, the Barbee tract, and the Jackson tract; the soil is very good; that a good deal of it is what is called Hagerstown loam; that some of it might be classed as black Carter loam, Albemarle pippin land; that it is a fine class of soil, extra good soil, deep, dark brown color, one of our best soils; that it is extra for fruit, particularly apples, but will grow all kinds of fruit; the main crop in Virginia being apples. Part of that land will grow Albemarle pippins, first rate, fine quality pippins. I am well acquainted with the subject of the pippin lands in Virginia; that the area that is good for Albemarle pippins is very limited in Virginia. It is confined to the Alleghany Mountains, the disintegration of the feldspathic rock formed in ages around Albemarle and the Blue Ridge where the mountain is broken up, that is the only pippin land that we have. It grows Albemarle pippins of the highest flavor; it is the best seller and the highest priced apple in the world, in this country or foreign markets. * * * That the land, such as the land in question, sells around Winchester as high as $150.00 per acre. * * * I doubt if land, located like that is, as fine fruit land as that is, can be bought at $75.00 in Virginia. I don't know of but very little land in the State that can beat that as fruit land. That character of land is going to advance very rapidly in the future because there is so little of it. * * * I think the land is cheap at $75.00 an acre and I do not think that $100.00 would be an extravagant price for it. * * *"

J. L. Phillips, located at Staunton, Va., an orchard expert for the last two years, and who has worked in this capacity for 15 years, and who prior to that was acting as State officer, State entomologist, and studying orcharding, testified (R., 49):

> "* * * Am acquainted with the Macatee, Jackson, Barbee, and Thompson land * * * The Macatee tract and the Jackson tract, and the first tracts we spoke of, a large portion, practically all the Macatee tract and a large portion of the other tract on the same side of the road would grow excellent pippins. It is a deep, rich, black soil, we have already mentioned in which the pippin is at home. * * * The land is equal to any of the apple lands in Rappahannock and Albemarle and superior in the fact that it is not so much on a cove, but it is open to the breeze and air currents and less liable to disease of fruit and foliage than it would be in many of the soils in the State for the growing of the pippin. * * * The Macatee tract and the tract adjoining that, or nearly adjoining it (the Jackson tract) would certainly be worth $100.00 per acre for orchard purposes. * * *"

G. W. Kinsey, a farmer of Rappahannock county, testified as follows (R., 62):

> "I know the Macatee, Jackson, Barbee lands very well. * * * They have a splendid macadam road. * * * The land on the right hand side of the road going to Front Royal is easily worth $75.00 an acre. * * * I would place the Barbee land from the old house up to the school house at $85.00 an acre, and the land below the house running up towards the top of the hill, I would place at $75.00. * * * The Barbee land I place at $85 runs up on the grade on the right hand side of the road towards the school house. * * *"

James Fletcher, of Rappahannock, a farmer, miller, and buyer of cattle, testified as follows (R., 64):

"* * * Taking into consideration all of the uses to which these lands can be put, grazing, fruit growing, location, etc., I would think a fair value from $75 to $100, and the Barbee land, I think, is worth a little more than the others; I think that is worth $100. The Alma Jackson land is worth $75 to $100; the Macatee land about the same. * * * I think there would be no trouble to sell it for $75 for grazing purposes. I think it would bring $75 to $100 for grazing purposes. I know a great many men make money at such prices as that; it is being sought for. * * *"

Frank D. Wood, a farmer and fruit grower, testified as follows (R., 67):

"The Macatee land from a grazing and fruit growing standpoint is worth, I should say, between $75 and $90 an acre. The Barbee land from $80 to $95, possibly $100 per acre. That is a little better than the Macatee land because the Macatee land is a much larger tract and some of it not as good as the Barbee land. * * *"

J. M. Stickley, a farmer of Warren county all his life, testified as follows (R., 73):

"I am a supervisor of Cedarville district for twelve to fifteen years. I am acquainted with the Misses Macatee, Mrs. Jackson and Miss Lucy Barbee tract. I should think that the Macatee land would be worth somewhere from $80 to $90 an acre, and Miss Lucy Barbee's maybe, perhaps, $75; and Mrs. Jackson's somewhere about $75 or $80. * * *"

N. S. Waller testified as follows (R., 75):

"I reside four miles and a half southeast of Front Royal; lived there some thirty years or more, adjoining the Macatee land. I used to be interested in the farm, grazed on it in years past. Have been over it all often, each tract. I think the Macatee land is worth $75 an acre; and Miss Barbee's land, in that it

has a dwelling-house upon it and has an orchard, is worth more than Mrs. Jackson's about $85. * * *"

Miss Lucy Barbee, one of the land-owners, testified as follows (R., 82):

"* * * I value it at $100 an acre. I think I could get that if the Government did not want it. * * * I mean to say that I could get $100 for it if the Government did not want it, as a summer resort anyway. * * *"

Mrs. Alma Jackson, one of the land-owners, testified as follows (R., 83):

"* * * Have never thought of selling it. It is fine grazing land. I consider the money well invested and growing in value. I never wanted to sell it and never considered an offer for it at all, but I would think certainly $100 would be a fair price for it. Captain Conrad, on behalf of the Government, tried to procure an option on this land, but I declined to give it because I had refused more than that. * * *"

If, as we contend, and as shown clearly by the foregoing extracts, the report of the commissioners, confirmed by the court below, disregarded on its face important, material and uncontradicted testimony, the issue raised under this exception becomes one of law, as was held in the case of Oregon, &c., Ry. Co. *vs.* Fairchild, 224 U. S., 511, when the court said:

"That being so, it leaves for consideration the contention that as a matter of law, the order on the facts proved, was so unreasonable, as to amount to the taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony or deciding pure questions of fact, but, as said in Kansas City Ry. Co. *vs.* Albers Commission Co., 223 U. S., 573, 591, from an inspection of the 'entire record,

> including the evidence, if properly incorporated therein,' to determine whether what purports to be finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

The foregoing cases relate to the consideration of writs of error to State courts, wherein the Supreme Court will consider only questions of law and questions of facts *only* as incidental thereto, but no such limitation is imposed upon this court, if it should be of the opinion, upon an examination of the entire record, that the findings of the lower court in confirming the report of the commissioners are, as we contend, wholly unwarranted.

In the case of Beyer *vs.* Le Fevre, 186 U. S., 114, the Supreme Court went so far as to *reverse the appellate court where said court concurred in the findings of the jury of the trial court.*

In that case the court, speaking through Mr. Justice Brewer, after affirming the proposition that when the trial and appellate courts agree as to the facts established on the tiral, the Supreme Court will accept their conclusion, and not attempt to weigh conflicting testimony (Stuart *vs.* Hayden, 169 U. S., 1), went on to say (p. 119):

> "These propositions we have often affirmed. At the same time there has always been recognized the right and the duty of this court to examine the record, and, if it finds that the conclusions are wholly unwarranted by the testimony, it will set the verdict or report aside and direct a re-examination."

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

E. HILTON JACKSON,
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UNITED STATES v. BEATTY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 555. Argued January 12, 13, 1914.—Decided February 24, 1914.

A judgment of the Circuit Court of Appeals, reversing a judgment of the District Court which confirmed an award of commissioners in condemnation proceedings by the United States and vacating that award and requiring the compensation to be ascertained through a trial by jury, is not a final judgment but essentially interlocutory and not reviewable by this court.

A writ of error to review such a judgment of the Circuit Court of Appeals is premature and must be dismissed; if the judgment is erroneous and ultimately operates prejudicially to the Government, it may have the error corrected by writ of error from this court after the case has proceeded to final judgment in the Circuit Court of Appeals.

If a case can be brought to this court by appeal or writ of error under § 241, Judicial Code, it cannot be brought here by certiorari under § 240, Judicial Code; the two methods of review are not co-existent.

The power given to this court by § 262, Judicial Code (§ 719, Rev. Stat.), contemplates the employment of the writ of certiorari in instances not covered by § 240, Judicial Code.

A decision by the Circuit Court of Appeals that the provision in the Seventh Amendment preserving the right of trial by jury applies to a proceeding to condemn land and remanding the case to the District Court for further proceedings in accord with that decision, is an exercise of undoubted jurisdiction whether right or wrong, and if wrong and ultimately operating to the prejudice of the Government it can be reviewed and corrected by this court on writ of error from the final judgment, but not from the interlocutory judgment.

Interlocutory judgments frequently become of no importance by reason of the final result or of intervening matters.

Writ of error to review, 203 Fed. Rep. 620, dismissed and petition for writ of certiorari denied.

THE facts, which involve the jurisdiction of this court to review judgments of the Circuit Courts of Appeals, are stated in the opinion.

The Solicitor General, with whom *Mr. W. C. Herron* was on the brief, for the United States.

Mr. E. Hilton Jackson and *Mr. D. C. O'Flaherty*, with whom *Mr. E. H. Jackson* was on the brief, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a statutory proceeding by the United States to acquire for public use, by condemnation under judicial process, certain land in Warren County, in the Western District of Virginia. It was based upon two congressional enactments: one, a provision in the Army Appropriation Act of March 3, 1911, c. 209, 36 Stat. 1037, 1049, appropriating "not to exceed two hundred thousand dollars for the purchase of land accessible to the horse-raising section of the State of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service;" and the other, the act of August 1, 1888, c. 728, 25 Stat. 357, which reads as follows:

"That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced

for condemnation, within thirty days from the receipt of the application at the Department of Justice.

"SEC. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

The proceeding was initiated, under the Attorney General's direction, by a petition filed in the District Court of the United States for the district wherein the land is situate, praying for the appointment of commissioners, according to the law of the State, to ascertain the just compensation to be paid. Due notice having been given, the owners appeared and interposed objections to the proceeding; all of which having been considered and overruled, an order was entered appointing commissioners agreeably to the prayer in the petition and to the state statute. The commissioners viewed the land, heard the evidence, fixed the compensation at upwards of $30,000, and returned into the District Court a report of their proceedings and ascertainment. Exceptions to the report were filed by the owners and, after a hearing, were overruled; whereupon a judgment was entered confirming the report. 198 Fed. Rep. 284. The owners carried the cause to the Circuit Court of Appeals, and that court, being of opinion that the Seventh Amendment to the Constitution, preserving the right of trial by jury, embraces such a proceeding, reversed the judgment, with a direction that the compensation be determined upon a trial before a common-law jury. 203 Fed. Rep. 620. The United States then sued out the present writ of error, and subsequently presented a petition praying that the judgment of the Circuit Court of Appeals be reviewed upon writ of certiorari, if the writ of error should be regarded as premature.

Consideration of this petition was postponed to the hearing upon the writ of error.

As the proceeding was begun by the United States and the amount in controversy greatly exceeds $1,000, besides costs, there can be no doubt that the case is one in which a final judgment in the Circuit Court of Appeals may be reviewed by this court upon a writ of error. Judicial Code, §§ 128, 241. But the judgment rendered in that court is not final either in form or substance. It reverses the judgment in the District Court, vacates the commissioners' award, and requires that the compensation be ascertained anew through a trial by jury. Thus, it puts at large the principal matter in controversy and refers it to the District Court for solution in the mode indicated. It is therefore essentially interlocutory and cannot be the subject of a writ of error from this court. *Tracy* v. *Holcombe*, 24 How. 426; *Macfarland* v. *Brown*, 187 U. S. 239; *United States* v. *Krall*, 174 U. S. 385; *German National Bank* v. *Speckert*, 181 U. S. 405, 409. If it be erroneous and ultimately operates prejudicially to the United States the latter may, of course, secure its correction by a writ of error from this court, but not until the case proceeds to a final judgment in the Circuit Court of Appeals. *United States* v. *Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445, 454; *Union Trust Co.* v. *Westhus*, 228 U. S. 519, and cases cited. Being premature, the writ of error must be dismissed.

The power conferred upon this court by § 240 of the Judicial Code to require, by writ of certiorari, that cases in the Circuit Courts of Appeals be certified here for review and determination is plainly confined to that class of cases in which, according to the provisions of §§ 128 and 241, the final decrees and judgments of those courts are not reviewable upon appeal or writ of error; that is to say, if a case be one which may come here under § 241 by

appeal or writ of error after a final decree or judgment in the Circuit Court of Appeals, it is not a case which may be brought here by certiorari under § 240. It is not intended that these two modes of exercising appellate authority over the Circuit Courts of Appeals, one upon appeal or writ of error and the other upon certiorari, shall be co-existent as respects any case or class of cases, but rather that the former, where it exists at all, shall be exclusive. This is fully recognized in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *American Construction Co.* v. *Jacksonville Co.*, 148 U. S. 372, 385, and *Forsyth* v. *Hammond*, 166 U. S. 506, 513, 514.

This case is not within any of the classes enumerated in the latter part of § 128 and the amount in controversy is greatly in excess of $1,000, besides costs, so it is a case, as before indicated, in which a final judgment by the Circuit Court of Appeals may be reviewed by this court upon writ of error under § 241. And from this it follows that it is not a case which may be brought here by certiorari under § 240.

We do not overlook § 262 of the Judicial Code, formerly § 716 of the Revised Statutes, which empowers this court to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. No doubt, this provision contemplates the employment of the writ of certiorari in instances not covered by § 240 and affords ample authority for using the writ as an auxiliary process and, whenever there is imperative necessity therefor, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways. *American Construction Co.* v. *Jacksonville Co.*, 148 U. S. 372, 380; *In re Chetwood*, 165 U. S. 443, 462; *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268. But it may not be used under this provision as a sub-

stitute for an appeal or writ of error to correct mere errors committed in the exercise of a lawful jurisdiction. *American Construction Co.* v. *Jacksonville Co., supra; In re Tampa Suburban R. R. Co.*, 168 U. S. 583; *United States* v. *Dickinson*, 213 U. S. 92, 102.

Here the use sought to be made of the writ is not an admissible one. Whether the Seventh Amendment, preserving the right of trial by jury, embraces a proceeding to condemn land for public use was one of the questions arising for decision in the Circuit Court of Appeals. In deciding it, the court but exercised an undoubted jurisdiction, and this whether the decision was right or wrong. If wrong, it was a mere error, and the land owners, having invited it, will not be heard to complain. The jury may award a less compensation than did the commissioners, and, if so, the United States will hardly be in a position to complain. Interlocutory rulings not infrequently become of no importance by reason of the final result or of intervening matters, and that may be true here. But if the decision ultimately operates prejudicially to the United States, it can be reviewed and, if need be, corrected upon a writ of error from the final judgment, as before indicated. In this situation we perceive no adequate reason for resorting to the writ of certiorari under § 262.

Writ of error dismissed;
Petition for certiorari denied.